

Nos. 21782 and 21782-A

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

SAMUEL REISMAN,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

## APPELLANT'S OPENING BRIEF.

BALL, HUNT, HART & BROWN,  
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**FILED**

**DEC 18 1967**

**WM. B. LUCK, CLERK**

**DEC 21 1967**



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*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

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**APPELLANT'S OPENING BRIEF.**

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**JURISDICTIONAL STATEMENT.**

The jurisdiction of the United States District Court, Southern District of California, Central Division, was based on 18 U.S.C.A. Section 3231. The jurisdiction of this court is based on 28 U.S.C.A. Section 1291. The indictment charging violations of 18 U.S.C. Section 1341, mail fraud, appears in the Clerk's Transcript of Record\* page 2.

**STATEMENT OF THE CASE.**

**The Indictment.**

Appellant Reisman was indicted in the United States District Court, Southern District of California, Central Division, for 79 counts of mail fraud under 18 U.S.C. Section 1341. Others charged in the same indictment

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\*The Clerk's Transcript of Record will be referred to as C. T. The Reporter's Transcript of Proceedings will be referred to as R. T.

were: Arnold Clejan, Joseph Benaron, Joseph J. Byrnes, Norman T. Rockel, Charles O. Escarzaga, Robert L. Stein, Maurice Weiss, Stanley J. Weiss, Frank L. Gillhouse, and Robert M. Jaffe. The indictment alleges in substance that beginning on or about June 9, 1959 and continuing until the return of the indictment, April 3, 1964, the defendants devised and executed a scheme to defraud purchasers of Nevada land known as the Gamble Ranch. The indictment charges that in connection with the sale of Gamble Ranch land certain false representations were made orally, in newspapers, motion pictures, slides, brochures, letters, and on radio and television. Each of the 79 counts is supported by a mailing allegedly made to execute the scheme.

### **The Verdicts.**

Appellant Reisman, Joseph Benaron, Joseph J. Byrnes, and Maurice Weiss were tried together in a jury trial that lasted thirteen weeks, from April 6 to July 2, 1965. Byrnes and appellant Reisman were found not guilty of count 6 and guilty of the other 78 counts [C. T. 1007; R. T. 14,950-14,954]. The jury found Benaron not guilty of count 6 but could not reach a verdict on the other 78 counts; as to those counts a mistrial was declared [R. T. 14,985-14,986]. The court granted a mistrial as to Maurice Weiss because he became ill during the trial [R. T. 14,305-14,306]. Various dispositions were made of the cases of defendants who did not go to trial. Appellant Reisman moved for judgment of acquittal or in the alternative for a new trial [C. T. 1018-21, 1025-33]. The court granted the motion for judgment of acquittal on counts 2 and 3



only, and denied the motion for a new trial [C. T. 1130]. Appellant Reisman appeals from the judgment of conviction [C. T. 1138-1139].

### Summary of the Facts.

Appellant Samuel Reisman is an attorney at law. He has practiced law in California since 1938. He has maintained his law office in the Citizens National Bank Building, 453 South Spring Street, Los Angeles, since 1943. His was primarily a trial, corporate and business type of practice in which he was quite successful. He had earned an excellent reputation as a citizen and as a lawyer [R. T. 12920-12929; 9532; 9535; 9592-L-3; 9949; 10,036; 10,115; 10,521; 13,959]. He had represented Joseph Benaron in various business ventures since 1946 or 1947. Before 1959 he had been an officer and director in several companies in which Benaron was interested. He acted as legal counsel rather than as a business executive for each of these companies [R. T. 12,920-12,921; 12,931-12,933].

Reisman first heard of the Gamble Ranch on September 7 or 8, 1959 when Benaron and Byrnes told him they each wanted to buy a 5% interest in the Ranch [R. T. 12,942-12,944]. The Gamble Ranch was located in Elko County in northeastern Nevada and consisted of over 600,000 acres. About 400,000 acres were owned by the Federal Bureau of Land Management and 236,000 acres were owned by B. M. Stewart. The Government owned alternate sections that formed a checkerboard with sections owned by Stewart. The Ranch was about 30 miles wide and 36 miles long. Its altitude ranged from about 3500 to 10,000 feet [R. T. 885, 894].

A Southern Pacific Railroad track bisected the Ranch. The town of Montello was located in the middle of the Ranch on the railroad. Northwest of Montello were the Ranch headquarters, housing areas, a feed mill and several reservoirs. At the headquarters some 5,000 acres of alfalfa and grain were grown. Electricity was brought in from Utah. Southeast of the railroad the only man-made improvements were three stock watering facilities and water pipeline. There were 50 to 70 reservoirs on the Ranch. The four principal reservoirs were Rock Springs Dam, 21 Mile Reservoir, Crittenden, and Dake [R. T. 889-893]. There were in excess of 100 springs, and in addition, a known water reservoir underneath most parts of the ranch property [R. T. 935-936].

Arnold Clejan bought the Gamble Ranch from B. M. Stewart in 1959 for \$2,500,000 which included the assumption of a \$300,000 first trust deed [R. T. 904]. On September 7 or 8, 1959 Benaron and Byrnes asked Reisman to draft an agreement whereby they would each buy from Clejan an undivided 5% interest in the Ranch. Reisman dictated a draft of an agreement. Since he was scheduled to leave Los Angeles for Europe he turned the matter over to Bertram Ross, a lawyer who shared offices with Reisman. Ross completed the transaction [R. T. 12,942-12,944, 10,617, 10,621-10,621-A, Ex. EH]. On September 16, 1959, when Reisman was in Europe, the California Division of Real Estate by letter asked Clejan to stop representing and selling Gamble Ranch land as commercial agricultural property. The Real Estate Division took the position that the land offered for sale did not qualify as commercial agricultural land and that therefore the sellers would have to

comply with the subdivision law and obtain a subdivision public report before making further sales [R. T. 4509-4510, Ex. AH]. Reisman returned from Europe on October 27, 1959. During his absence he had nothing to do with the Gamble Ranch. On November 6, 1959 the Real Estate Commission issued a formal cease and desist order [R. T. 12,942-1,944, Ex. 1-237].

When Benaron learned of the cease and desist order he asked Reisman to inquire about it from Clejan's attorney, Albert Allen [R. T. 12,951]. From Allen, Reisman learned that the Real Estate Commission objected to sales without a public report, in part to advertising material, and because Clejan was selling land encumbered by two mortgages. Allen took the position that the property was commercial agricultural land and therefore exempt from the requirement of the Subdivision Act that a public report be obtained [R. T. 12,953, 12,974-12,975, Exs. B and B-1]. After further investigation Reisman concluded that Allen's position was incorrect and that an application for a public report should be filed with the Real Estate Commission [R. T. 12,952-12,954]. At Benaron's request Reisman conferred a number of times with representatives of the Real Estate Commission and prepared and filed an application for a public report [R. T. 12,955, 13,048-13,049]. In December, 1959 Gamble Ranch Investments Company was formed. This company was a Nevada corporation. Reisman took no part in its incorporation. Benaron and Byrnes each exchanged their 5% interests in the land for 5% of the stock of the new company. Clejan exchanged his 90% interest in the land for 90% of the stock. Reisman prepared an agreement by which these exchanges were made [R. T. 12,963-

12,964, 12,977-12,978, Ex. FN]. On December 14, 1959 Reisman was elected president of the corporation; Benaron and Byrnes were elected vice presidents [R. T. 12,993].

Through December, 1959 and January, 1960 Reisman continued to represent the company in processing the application for a public report. He conferred with members of the Real Estate Commission. He submitted to the Commission material concerning the ranch: a water report prepared by civil and consulting engineers, letters concerning the availability of electricity, and other material. On January 5, 1960 Mr. Bircher from the Real Estate Division visited the Gamble Ranch and rendered a detailed report of his observations and conclusions. The Division reviewed the company's advertising and suggested changes that were made. A public report was issued on 40,000 acres southeast of Montello in February, 1960. As other sections of land were sold, other public reports were issued. Reisman's office represented the company in obtaining public reports from December, 1959 through the spring of 1962 [R. T. 12,999, 13,001, 13,011, 13,025-13047, Ex. CA, 13,048-13,050, Ex. A, 13,052].

Reisman acquired 2% of Gamble Ranch Investments Company stock in June, 1960. At the end of 1960 he bought more stock until he finally owned about 13% of the total [R. T. 13,054-13,057].

In 1960, Reisman reviewed the company's advertising material at Benaron's request. Some of the advertising was reviewed by Bertram Ross, the sole practitioner who shared offices with Reisman, and by Herbert Weiser, a lawyer employed by Reisman. The lawyers judged the brochures and other advertising by compar-



ing them to source materials that were provided them: pictures and reports in a book compiled by Previews, Inc. for B. M. Stewart for use in selling the Ranch to Clejan [Exs. 1-1128; 2-234]; documents from the Elko County Chamber of Commerce [Ex. 2-258]; letters from an agricultural expert [Ex. B-4]; a water report [Ex. 2-884], and other material [Exs. EJ 2-6, 2-114, 2-237, 2-870-B, 2-883, 2-883-KK-1, 2-885, 2-885-A, and 2-1248]. [R. T. 13,058-13,060, 13-083-13084]. Reisman made various changes in the advertising submitted to him. He testified that he deleted or changed anything he thought was misleading or untrue. In May, 1961 he advised a producer of radio and television commercials that all advertising "should be on a highly ethical plane." [R. T. 13,074-13,076, 13-110-13,111, 13,120-13,122, Ex. Q-1]. Advertising producers testified that Reisman made changes in advertising he considered improper [R. T. 1473-1475, 1490-1491, 1497-1498, Ex. 2-47, 1505-1507, 1630, 1635 (witness Beattie), 1174-1176, 1387-1388, 1318, 1389-1390, 1446-1447, Ex. 2-365 (witness Roche)].

In the latter part of 1961 the company decided to make a public stock offering to raise money for development of the Ranch. Reisman assisted in the preparation of the S-1 Securities and Exchange Commission Registration Statement [R. T. 13,191]. Reisman and Ross testified that on September 26, 1961 they went to the Real Estate Division to ask if the company was in good standing with the Division and whether the Division had received any complaints about the company. Reisman did not want to sell stock to the public if the company was not in good standing. Robert Schofield and Henry Block of the Real Estate Division

told Reisman and Ross that they had heard of no complaints and that the company had complied with all applicable regulations [R. T. 11,194-11,197, 13-193-13,197, Ex. EP].

Morris Cohon, a New York underwriter and securities broker and dealer, testified that on September 18, 1961 he sent to Gamble Ranch a letter of intent to underwrite the proposed stock issue [R. T. 10,145-10,146, Ex. EE]. Cohon later committed himself to a firm underwriting of \$2,500,000 [R. T. 10,098-10,099]. The firm commitment meant that the underwriter would own the stock. He would be obligated to pay the company \$2,500,000 even if he could not sell the stock [R. T. 10,113-10,114]. Cohon, a specialist in real estate ventures, concluded that the stock would be a fair financial offer to the public [R. T. 10,119]. However, the underwriting was never completed because the California Corporations Commissioner refused to issue a permit to sell the stock in California. Cohon could not underwrite the issue after the largest market for the stock had been eliminated. So the company did not receive the money for development [R. T. 10,141-10,142, 10,148].

Hundreds of letters of complaint and other communications from land purchasers were received in evidence. Reisman testified that the complaints or refund requests of only some thirteen purchasers came to his personal attention. The first was in July, 1961 [R. T. 13,157-13,189; Ex. FY], and the last in November, 1961 [R. T. 13,157-13,189; Exs. GH, GI, 1-632]. Only four were claims of misrepresentation [R. T. 13,165-13,189, Exs. FZ, 1-543, GB, GF, DI, 1-632, BF]. These purchasers were given refunds. A fifth letter

was from a prospective purchaser who had heard from a Nevada real estate official of misrepresentation by Gamble Ranch personnel. He was invited to the Ranch [R. T. 13,157-13,162, Ex. FY]. The other eight purchasers wanted to cancel their contracts for financial reasons. They were given refunds, different parcels of property, or were otherwise satisfied [R. T. 13,165-13,172, Ex. FZ; 13,171-13,176, Exs. GC, GD, GE, GF; 13,178-13,185, Exs. GG, GH; 13,189].

In January, 1962 the Nevada Real Estate Commission issued a publicity release saying that the company would refund money to all purchasers who wanted a refund [Ex. 3-2024]. The statement was incorrect. Following the article a large number of complaints or requests for refunds were made. Reisman was relieved as an attorney of the duty of handling complaints [R. T. 13,319-13,320]. For a short time in early 1962 the law firm of Wyman, Finell & Rothman handled these customer complaints and refund requests and decided whether to make refunds. Refunds were made to purchasers who claimed misrepresentation [R. T. 12,599-12,603]. Then Bertram Ross reviewed and disposed of all complaints until March, 1963. Ross was retained by Gamble Ranch as independent counsel for this purpose. He was paid for his services. He had no connection with Reisman in this function. He dealt with some 269 complaints during that period [R. T. 11,151, 11,165, 11,247-11,251, 13,320]. Another lawyer, Richard Allan Weiss, replaced Ross and handled complaints beginning in March, 1963 [R. T. 11,165].

The last public report was issued on April 23, 1962. At that time the Real Estate Division had no reason to stop Gamble Ranch sales [R. T. 7186-7188]. However,

shortly afterward, the Division advised the company that some misrepresentations were allegedly made by salesmen. In June, 1962 attorneys Wyman, Finell, and Ross met with representatives of the Real Estate Division to discuss the matter. Reisman was out of the country at that time. The lawyers agreed on behalf of the company to stop selling land until the problem was resolved. They agreed to sign a consent cease and desist order [Ex. 1-1125]. But all three lawyers testified that their clients would sign the consent decree only with the understanding that: it was not an admission of fraud or wrongdoing and would not be so construed; the Real Estate Division would not release the information to the news media [R. T. 14,017-14,027, 12,606-12,613, 11,192-11,194]. That testimony is uncontradicted. However, publicity was released in breach of this agreement within 24 hours after the agreement was made [R. T. 12,613]. And in the trial of this case the consent decree was admitted in evidence over defendants' objections for the purpose of showing an admission of fraud and wrongdoing [R. T. 6283, 6454, 5832, 12,632-12,635, 11,474-11,480, 11,493, 14,381-14,382, 14,780-14,781].

Through the early part of 1962 appellant continued to do legal work in connection with filing the Securities & Exchange Commission Registration Statement and the issuance of subdivision public reports [R. T. 13,302-13,307]. In June, 1962 appellant resigned as president of the company.



I.

THE COURT IMPROPERLY ADMITTED IN EVIDENCE, AND ADMONISHED THE JURY REGARDING, LETTERS OF COMPLAINT FROM LAND PURCHASERS.

Introduction.

Hundreds of letters written by dissatisfied purchasers of Gamble Ranch land were admitted in evidence. Copies of some of these complaint letters are attached for illustration in Appendices A, B, and C. The attached copies by no means exhaust the number of such letters. Most letters contain angry denunciations and charges of fraud and misrepresentation. All letters admitted in evidence were taken to the jury deliberation room for examination by the jurors. Many complaints were read in evidence. That such letters were highly prejudicial to the defendants cannot be disputed.

The court admonished the jury that the complaint letters were not admitted to prove the truth of their contents, but as to the purpose for their admission the court gave many different explanations. The admission in evidence of these complaint letters, and the court's admonitions as to the purpose for their admission, constitute reversible error under the recent decision of this Court in *Phillips v. United States*, 356 F. 2d 297 (9th Cir. 1965), which was followed in *Windsor v. United States*, ..... F. 2d ..... (9th Cir. 1967), No. 19,174.

The *Phillips* case sets out three requirements for the admission in evidence of complaint letters:

- (1) At the time the documents are offered the trial court must make a preliminary determina-

tion as to whether there is *prima facie* evidence showing that the defendant had actual, personal knowledge of the complaint letters.

- (2) The evidence must be sufficient to support a *prima facie* finding that the defendant had actual, personal knowledge of the complaint letters.
- (3) The trial court must admonish the jury in plain and direct language that complaint letters may be considered only if evidence independent of the letters themselves shows that the defendant had actual, personal knowledge of such letters.

If the record does not show compliance with these three requirements, the judgment of conviction will be reversed even though other evidence may amply establish defendant's guilt beyond a reasonable doubt. The trial court in the present case did not comply with these three rules.

**A. The Court Did Not Make the Necessary Preliminary Finding That Appellant Had Personal Knowledge of the Complaint Letters.**

*Phillips v. United States, supra*, involved a prosecution for mail fraud and conspiracy to commit mail fraud by making allegedly false representations to sell Oregon land. The facts are remarkably similar to the facts of the present case. Appellants were an attorney and two other persons who organized a corporation to develop and sell the land. As in the present case, the indictment charged that brochures and newspaper advertising contained false and misleading statements and

pictures. The land was represented to be “rich, fertile land . . . a fertile valley” with “boating, water skiing, golfing, swimming,” and to have “Four exciting seasons! 300 days of warm wonderful sunshine throughout the year.” The offer was described as a “sound investment opportunity” in “an area of booming population.” (365 F. 2d at 300). In fact, the property was vacant desert land. Photographs showed mountains, lakes, valleys and recreational scenes—all miles from the land for sale.

The trial court in *Phillips* admitted in evidence ten cancellation letters from dissatisfied customers and a group of order coupons from prospective purchasers. In the present case hundreds of complaint letters were received in evidence [See, *e.g.*: R. T. 5958, Exs. 3-296 to 3-414; R. T. 6337-6338, Exs. 3-415 to 3-550; R. T. 14,045, Exs. 3-2132 to 3-2134]. In *Phillips* only one short letter was read to the jury (365 F. 2d at 301, f.n. 1). The court summarized for the jury the other nine complaint letters. The jury was not permitted to see any of the remaining documents. In the present case, many complaint letters were read to the jury [See *e.g.*: R. T. 3803-3805-3808, Ex. 2-1172; R. T. 3786-3790, Ex. 2-1118; R. T. 5815, Ex. 3-862]. On occasion the Government attorney would offer a series of complaint letters and read selected documents, such as “every fourth or fifth file.” [R. T. 6370, 6338, Exs. 3-415 to 3-550, and particularly, *e.g.*, R. T. 6338-6363, Exs. 3-416, 3-419 to 3-423, 3-427, 3-429, 3-432, 3-438 to 3-440, 3-448, 3-459, 3-464, 3-488; R. T. 6370-6377,

Exs. 3-506, 3-543]. The Government attorney announced in the presence of the jury that he had made a list of complaint letters in a particular group that he wanted to read “and it came out 120” [R. T. 6370]. After reading selected letters, he said:

“I believe, your Honor, we may as well conclude with that. The others are of a similar vein” [R. T. 6376-6377].

All exhibits were removed to the jury deliberation room. The jurors had available for examination all complaint letters received in evidence.

The court in *Phillips* told the jury that the complaints and coupons were not to be considered for the truth of their contents but only on the question whether one or more defendants “knew” or had “notice” that advertising might be creating a false impression. The court did not explain that the knowledge required was actual personal knowledge of the particular defendant. Constructive knowledge is not enough; the knowledge of one person in the venture may not be imputed to another.\* (356 F. 2d at 305.) And before complaint letters are even admitted in evidence the trial judge must make a preliminary finding that there is *prima facie* evidence apart from the documents themselves that the defendant had actual, personal knowledge of the complaints.

“Where this is the theory upon which documents are admitted, the trial court should also, at the time the documents are offered in evidence, make a preliminary determination as to whether there is *prima facie* evidence showing such actual

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\*This point is presented in detail in argument C, *infra*.

knowledge. Lacking such prima facie showing the documents should not be admitted.” (356 F. 2d at 306, f.n. 8.)

The court on appeal will not presume that the trial court made the necessary preliminary determination either (1) from a record that is silent as to whether the determination was made, or (2) from the fact that the documents were admitted in evidence. In *Phillips* the court found, although the documents were received in evidence, that:

“No such preliminary determination was made in this case.” (356 F. 2d at 306, f.n. 8.)

No such preliminary determination was made in the present case. There is nothing in the record to show that the trial judge made the requisite preliminary finding of actual, personal knowledge. But this record is not silent as to whether the court made the determination; the record affirmatively shows that the court did not make the determination. The complaint letters were received in evidence because there was testimony that they were found in files kept “in the ordinary course of the company’s business.” They were admitted not because they came to the personal attention of appellant but because the court supposed they were business records.

The complaint letters were not business records under 28 U.S.C. §1732. In the *Phillips* case, the court said, at 307:

“At least as to the letters comprising exhibit 968 [the ten complaint letters], appellants are correct in asserting that these communications do not constitute business records within the meaning of sec-



tion 1732. They were not made in the regular course of the business of the company in whose files they were found—a showing which must be made to give application to the Business Records Act. Instead, they were letters, written by outsiders, addressed to the land company and, in three instances, to defendant Hall.”

Because the trial court received the complaint letters as business records, it could not have made the necessary preliminary determination that appellant had actual knowledge of the complaints. The court was not thinking about personal knowledge as a basis for admission of the letters. The court was concerned only with deciding whether the documents were kept in the ordinary course of business or were found in the company files. The record is replete with examples. The group of complaint exhibits marked 3-296 through 3-414 was received because the Government attorney said he had laid a foundation showing that they were business records of Gamble Ranch.

“The Court: Mr. Nissen, these are files that you say there has been testimony by at least one time president of the Gamble Ranch, that they were kept in the normal course of business?

Mr. Nissen: Yes, sir.

\* \* \* \* \*

The Court: Maybe some files were kept in the normal course of business and maybe some were not.

*If there was testimony these were kept in the normal course of business I will allow them in.”*  
[R. T. 5957-5958. Emphasis added].

The showing of materiality was not that the defendants had actual knowledge of the complaints but simply *that they were complaints*:

“The Court: What is the materiality?

Mr. Nissen: These are complaints and refunds files, sir, with letters from customers to and from, about their visits to the Ranch and so forth.

The Court: Ordered in evidence.” [R. T. 5958].

In a discussion between the court and counsel regarding the basis for admitting complaint letters, the court asked only whether the documents were kept in the ordinary course of business.

“Mr. Rothman: As I understood the basis of the court’s ruling, if it was from Gamble Ranch files that the foundation for the letters had been laid. \* \* \* \*

The Court: Is there any question about his file being kept in the regular course of business?

Mr. Rothman: No, I don’t have any question about his file being kept in the regular course of business.

The Court: That would be the question.” [R. T. 7512].

The court further held that documents were *relevant* if they qualified as business records. Regarding the admissibility of a letter from an unidentified person to Ranch Land, a company that had no connection with Gamble Ranch, the following discussion took place:

“Mr. Rothman: . . . I cannot see how that letter can possibly be relevant as to these defendants.

The Court: . . . If it is a letter in the file of Gamble Ranch and the file has been—the foundation has been laid, that the file is kept in the normal course of business, I think it can be considered.” [R. T. 4443].

The “business record” foundation was established at one time for hundreds of complaint letters and files. The court had only to be satisfied that the complaints “. . . are records of the Gamble Ranch . . . [k]ept in the normal course of their business.” [R. T. 6337, Exs. 3-415 to 3-550]. The admission of the complaints cannot be justified under the Business Records Act (*Phillips v. United States, supra*, 356 F. 2d at 307). As in the *Phillips* case, the court here did not make a preliminary determination that there was *prima facie* evidence showing that appellant had actual, personal knowledge of the complaints. The court’s only inquiry was whether the complaints were found in company files. “Lacking such *prima facie* showing, the documents should not be admitted.” (*Phillips v. United States, supra*, 356 F. 2d at 306, f.n. 8). The error was manifestly prejudicial to appellant. The jury was permitted to consider hundreds of inflammatory charges on the question of appellant’s intent although it was never shown or decided that he had actual knowledge of them. For this substantial error, the judgment of conviction should be reversed.



**B. The Evidence Is Insufficient to Show That Appellant Had Actual, Personal Knowledge of the Complaint Letters.**

A defendant's actual knowledge of complaint letters may be established by circumstantial evidence. But there must be "substantial evidence that a particular defendant knew of these letters or requests while the venture was still in progress." (*Phillips v. United States, supra*, 356 F. 2d at 305; accord see *Windsor v. United States*, ..... F. 2d ..... (9th Cir. 1967), No. 19,174). There is no substantial evidence in this case to show that appellant had actual knowledge of the complaint letters.

**Complaints Reviewed by Appellant.**

Appellant testified that of all the complaint or refund letters admitted in evidence he had actual knowledge of only thirteen. There is no evidence to contradict appellant's testimony. Appellant dealt with the first complaint or refund request in July, 1961 and the last in November, 1961. Only four were claims of misrepresentation:

- (1) Gloria was given a full refund after appellant asked that there be immediate investigation of the matter [R. T. 13,165-13,172; Exs. FZ, GB, 1-543].
- (2) Hempstead rescinded his contract and was given a full refund [R. T. 13176-13178; Ex. GF].
- (3) Munson was given a full refund after appellant asked the Gamble Ranch general manager to "please see that the matter is handled immediately and to the customer's full satisfaction." [R. T. 13182-13184; Exs. G-1, 1-632].

- (4) McCann received a full refund [R. T. 13188-13189; Ex. BF].

A fifth purchaser did not claim that Gamble Ranch personnel had made misrepresentations to him:

- (5) Salamone wrote that he had been told by Nevada officials that the Gamble Ranch Company had misrepresented the property. Salamone was invited to visit the Ranch [R. T. 13157-13162; Ex. FY].

The other eight purchasers wanted to cancel their contracts for financial or other reasons. They did not claim misrepresentation. These eight were either given refunds or their requests were handled in some other satisfactory manner:

- (6) Lopez was unable to make payments. He was given a smaller parcel [R. T. 13165-13172; Exs. FZ, GA, GB, 1-543].
- (7) Weidemann moved to Ohio and wanted to rescind. The record does not show what final disposition was made [R. T. 13165-13172; Exs. FZ, GB, 1-543].
- (8) Ferrari thought he was overcharged so he was given a discount [R. T. 13172-13174; Ex. GC].
- (9) Fandrich had financial problems and wanted land in a different location. The company made an exchange of land [R. T. 13174; Ex. GD].
- (10) Cantu was inadvertently sold a parcel of land that had already been sold to someone else. He was given a full refund [R. T. 13174-13176; Ex. GE].

(11) Miller's property was being sold again by a Gamble Ranch Salesman at Miller's request [R. T. 13178-13179; Ex. GG].

(12) and 13)

Arthur and Ruppel could not make payments. The record does not show the disposition of their refund requests [R. T. 13179-13182; Ex. GH].

There is no evidence that appellant had actual knowledge of any other complaint letters. Indeed, the evidence affirmatively shows that appellant did not review or have knowledge of other complaints. Appellant last reviewed complaint letters in November, 1961 [Ex. GH, GI, 1-632]. The uncontradicted evidence shows that complaints were thereafter specifically assigned to other persons for review and processing [R. T. 13,320].

#### **Complaints Reviewed by Attorney Finell.**

In early January, 1962 the Nevada Real Estate Commission issued an incorrect publicity release saying that Gamble Ranch would refund money to any dissatisfied purchaser of land [See, *e.g.*, Ex. 1-1026]. Following that news, the company was flooded with complaints and refund requests. Because of the vast number of letters, the company had to formulate guidelines to determine when to give and when to refuse refunds. For this purpose Mr. Marvin Finell of the law firm of Wyman, Finell and Rothman was retained. Finell handled complaints in early 1962. He established standards for deciding whether to give a refund. Refunds were given only if the purchaser claimed the land had been misrepresented. After Finell established a pattern for handling complaints he told defendant Byrnes they

could be processed by someone in the Gamble Ranch office [R. T. 12,599-12,603]. There is no evidence that any such complaints were reviewed by appellant.

The group of complaints marked Exhibits 3-296 to 3-414 were for the most part sent in January, 1962. The complaints were sent to the Gamble Ranch office on Wilshire Boulevard in Beverly Hills. Norman Rockel, Gamble Ranch General Manager in 1961 and early 1962, testified for the Government that he forwarded complaints to Finell's office, Finell decided whether to give a refund, then Rockel sent the customer a form letter answering the complaint in accordance with Finell's decision [R. T. 5508-5509]. All complaints and refund requests were sent to Finell in early 1962 [R. T. 5755]. This testimony is uncontradicted. There is no evidence that appellant Reisman reviewed or had actual knowledge of complaints received in early 1962.

Examples of some of the complaints that followed the January, 1962 publicity, most of which were sent in January, 1962, are collected in Appendix A [See *e.g.*, Exs. 3-305, 3-306, 3-308, 3-346, 3-355, 3-362, 3-383, 3-391, 3-393, 3-393, 3-401, 3-402]. These complaints bear the Gamble Ranch Beverly Hills office "received" date stamp. Appellant's office has been at 453 South Spring Street, Los Angeles, since 1943 [R. T. 12923]. It had no connection with the Gamble Ranch Beverly Hills office. There is no evidence from Gamble Ranch office personnel or anyone else that appellant ever went through the Gamble Ranch office files to review complaints. It is clear from the evidence that appellant did not review complaints after November, 1961. Appellant would have had no reason to review complaints at the same time another lawyer, Finell, was doing so.

Finell's office was in Beverly Hills. It is hardly necessary to point out that appellant had no access to Finell's office files.

Despite the uncontradicted evidence, adduced by the Government as well as by the defendants, that in early 1962 all complaints were reviewed and handled by independent counsel, and that during this period appellant did not review complaints, these highly prejudicial letters were admitted for consideration against appellant. During this trial appellant was charged with knowledge of complaints contained in letters he never saw. Following are just a few examples: "I think I was cheated" [Ex. 3-308]; "Tonight as my husband and I were watching the news on television, *we were shocked at the words that came over the airwaves. Gamble Ranch is a Fraud!*" [Ex. 3-344]; "I feel that the property has been grossly misrepresented" [Ex. 3-401]; ". . . the property was misrepresented to me" [Ex. 3-402]. (Collected in Appendix A). Hundreds of similar letters were received against appellant. Some of these complaints are summarized under point C, below.

By a view of the evidence most favorable to the Government, the evidence affirmatively shows that appellant did not have actual knowledge of these complaints in early 1962. There is no evidence to support either a *prima facie* finding (*Phillips v. United States, supra*, 356 F. 2d at 306, f.n. 8), or a jury conclusion, based on substantial evidence, that appellant had actual, personal knowledge as required (*Phillips v. United States, supra*, 356 F. 2d 305). Because these letters were improperly admitted against appellant, the judgment of conviction should be reversed.



Complaints Reviewed  
by Attorney Ross.

There is a conflict in the evidence as to when Finell stopped reviewing complaints. The conflict does not concern appellant, however. There is no evidence that appellant reviewed or had knowledge of complaints at any time after November, 1961. The only question is when Finell stopped handling complaints and when Bertram Ross, the lawyer who shared office space with appellant, began to handle them. Finell testified that he processed complaints beginning in January, 1962 and continuing for some two to four weeks. After a pattern of complaints and standards for dealing with them had been established, Finell told defendant Byrnes that someone in the Gamble Ranch office could handle complaints [R. T. 12,602]. Rockel, the office manager in early 1962, testified that Finell made final decisions on refunds during February, 1962 [R. T. 5508-5509]. John W. Carey, a certified public accountant who succeeded Rockel and served as office manager from April to November, 1962, said that complaints were referred to Finell as late as April 1962 [R. T. 6253-6354, 6257]. Ross testified he was employed as counsel in July, 1962, to review complaints and handle refund requests. In that capacity he served until March, 1963 and was entirely independent of appellant [R. T. 11,151, 11,165, 11,247-11,251]. Carey testified that Ross "was substituted for Mr. Finell" [R. T. 6259]. And Ross said that complaints "were handled by Mr. Wyman's office [*i.e.*, Wyman, Finell and Rothman] up until the time I took the complaints over" [R. T. 11,164]. Altogether Ross



handled about 269 complaints and ten or twelve lawsuits brought by purchasers [R. T. 11,248-11,251; Ex. ER; Exs. 3-415 to 3-550; see examples in Appendix B]. Another attorney, Richard Allan Weiss, ultimately took over the handling of complaints from Ross in 1963 [R. T. 11,165].

Irrespective of the date Ross replaced Finell, the evidence clearly shows that appellant did not handle complaints in 1962 or 1963. At all times during 1962 and 1963 the company retained counsel for the purpose of processing complaints and refund requests. Ross shared offices with appellant. Sometimes appellant and Ross associated with each other on specific cases. But they were not partners. Appellant has never had a partner in the practice of law [R. T. 12923-12926]. It is not reasonable to assume that appellant went through Ross' files and looked at the complaint letters referred to Ross. There is certainly no evidence that he did. Nor is there any evidence that appellant at any time examined complaint letters in the Gamble Ranch office file in Beverly Hills. Appellant had no reason to examine or know of complaints that were being handled by other lawyers. The only evidence on the question is appellant's testimony that the only complaints or refund requests he saw were the thirteen he reviewed in 1961 [R. T. 13189]. As with the complaints reviewed by Finell, there is neither *prima facie* evidence nor substantial evidence that appellant had actual personal knowledge of complaints handled by Ross. Their admission in evidence against appellant was prejudicial error.

**C. The Court Erred Because It Did Not Admonish the Jury That Complaint Letters Could Be Considered Against Appellant Only if Independent Evidence Showed He Had Actual, Personal Knowledge of Such Letters.**

In *Phillips v. United States, supra*, the trial court received in evidence ten cancellation letters from dissatisfied land purchasers and a group of order coupons from prospective customers. The court read only one letter to the jury and summarized the other nine (356 F. 2d at 301, f.n. 1). The jury was not permitted to see any of the exhibits but the one read by the court. The court admonished the jury:

“By that, members of the jury, I mean anything that is stated in the letters in this particular exhibit is not to be considered by you as to the truth of the statements therein made, in that those persons are not here for cross examination. They are to be considered by you only as to the question of any more of these defendants, if any, having notice of any complaints that might have been made with reference to the particular property here in question [sic]. Only for that purpose may they be considered.” (356 F. 2d at 304, f.n. 5).

After the court in *Phillips* summarized the nine complaint letters, it told the jury that they had been summarized:

“... only in connection with your consideration of whether one or more of the defendants knew that the advertising material might be creating a false impression in persons who might be interested in the purchase of the property as advertised.” (356 F. 2d at 305).

On appeal, this Court held that even the above admonitions were not sufficient. It is not enough to tell the jury that complaints may be considered if the defendant “knew” or had “notice” of them. The court must tell the jury in unmistakable terms that there are *two distinct determinations* to be made:

(1) The complaints *cannot be considered at all, for any purpose*, unless the jury finds from evidence *independent* of the complaints themselves that a particular defendant had actual, personal knowledge of them.

“ . . . the jury should be told in plain and direct language, that such documents may be considered *only if* it has been *independently* shown that such defendant had *actual knowledge* of the documents while the asserted scheme was in progress.” (*Phillips v. United States, supra*, 356 F. 2d at 306. Emphasis added).

The court must make it clear that a defendant cannot be charged with “constructive” knowledge. The knowledge of another in the venture cannot be imputed to the accused.

“ . . . a conspirator’s intent to defraud may be inferred from the fact that he personally knew that the venture was operating deceitfully. But since it is the personal knowledge of the invidious fact which warrants such an inference, *nothing less than personal knowledge of that fact* will do to establish the fact even circumstantially. Thus so-called ‘constructive’ notice or knowledge of a circumstance, based upon the actual knowledge of a co-conspirator, agent or

employee, has no tendency, circumstantially or otherwise, to prove criminal intent.” (356 F. 2d at 303. Emphasis added).

(2) *Only if* the jury has found from independent evidence that a defendant had actual, personal knowledge of complaints may such complaints be considered. Only then does the jury reach the question of *how* to consider complaints. The court must tell the jury that if this second step is reached the complaints may not be considered for the truth of their contents but only in connection with whether a defendant knew that advertising might be misleading. (*Phillips v. United States*, supra, 356 F. 2d at 305).

The trial court in the present case, as did the court in the *Phillips* case, completely eliminated the first step. As each complaint exhibit was received in evidence the court instructed the jury only as to the purpose for which the complaint *could be considered*. The court said they were received “not for their truth.” But the court never told the jury that complaints *could not be considered at all* unless the jury found from independent evidence that a particular defendant had actual knowledge of the complaints. The court in *Phillips* refused to speculate whether the jury “could have found that each of the appellants had actual notice of the documents.” (356 F. 2d at 304). The omission in the admonitions of the necessary preliminary step is reversible error. *Phillips* was followed in *Windsor v. United States* (9th Cir. 1967), ..... F. 2d ....., No. 19,174, where this Court reversed the conviction of an attorney for mail fraud in the sale of land be-

cause of insufficient evidence that the accused had actual as distinguished from constructive knowledge of customer complaints.

In the present case the court gave a variety of instructions as to *how* complaints were to be considered. At no time did it properly advise the jury on the question of *whether* they could be considered. Some admonitions were nearly identical to those found erroneous in *Phillips*. In such cases the court told the jury that the complaints could be considered if defendants “knew” or had “knowledge” of them. For example, the court received in evidence Exhibits 3-296 to 3-414 (complaints reviewed by Attorney Finell) as “business records” [R. T. 5957-5958] and then told the jury that they were not admitted for the truth of what they assert, but:

“The complaints are relevant on the issue of the defendants’ intent and good faith.

“If the defendants *knew* that people were being misled by solicitation literature and salesmen’s representations and continued the same operation with this *knowledge*, this is a matter that the jury may consider in determining whether the defendants or any of them had any intent to defraud.” [R. T. 6031-6032. Emphasis added].

The admonition has the same vice as the instruction in *Phillips*. The words “knew” and “knowledge” permit the inference that constructive knowledge is sufficient to prove criminal intent. The following language from *Phillips* governs such an instruction:

“As the above-quoted portion of this instruction indicates, the jury was told that it should consider



these impressions only in connection with the jury's consideration of whether one or more of the defendants 'knew' that the advertising material might be creating a false impression. The court, however, did not explain that this would have to be actual knowledge based upon *substantial evidence* that a *particular defendant* knew of these letters or requests while the venture was still in progress. Under the instruction given, the jury could have attributed knowledge to one or more of the appellants concerning the documents, because *another appellant*, or an *acquitted defendant*, or the land company, escrow company, or the Bardwells (who were not defendants) had actual knowledge of such documents." (356 F. 2d at 305. Emphasis added).

In *Phillips*, the court thought the jury might construe the words "notice" or "knew" to include constructive knowledge. The danger of such a construction is far more real in the present case. On several occasions the court actually told the jury that defendants' knowledge could be proved constructively. When the Government offered Exhibit 3-352 the following colloquy took place between the Government attorney and the court in the presence of the jury:

"Mr. Nissen. May I state for the record, your Honor, that anything that is a statement of someone else, reported to *Gamble Ranch* or to any of *their personnel*, is offered for this reason: To show that the information was so reported and that *Gamble had that information in their file*.

The Court: Yes." [R. T. 4834. Emphasis added].



The court then instructed the jury accordingly:

“The Court: . . . Ladies and gentlemen, you should understand that, that anything in these communications said by the writer of these communications to have been told to him by someone else is not offered for the truth of what this person said to the writer of the letter.

It is only offered to show that information was passed on *to Mr. Stein or someone else in the Gamble Ranch organization.*” [R. T. 4834-4835. Emphasis added].

The statement of the Government attorney and the court’s instruction plainly advised the jury that complaints could be considered if—or because—they (1) were found in a company file; or (2) they came to *someone* in the company. There is no mention that appellant must have had knowledge of the complaint. This was unequivocally an instruction on constructive intent. The instruction left no doubt that the documents could be considered against appellant because they were in a company file or because they were “passed on” to “someone” in the organization. The following language from *Phillips* is particularly pertinent to this kind of instruction:

“The court, however, did not explain that this would have to be actual knowledge based upon substantial evidence that a particular defendant knew of these letters or requests while the venture was still in progress. Under the instruction given, the jury could have attributed knowledge to one or more of the appellants concerning the documents, because *another appellant*, or an *acquitted defend-*

*ant*, or *the land company*, *escrow company*, or *the Bardwells* (who were not defendants) had actual knowledge of such documents.” (356 F. 2d at 305. Emphasis added).

\* \* \*

“. . . so-called ‘constructive’ notice or knowledge of a circumstance, based upon the actual knowledge of a *co-conspirator*, *agent* or *employee*, has no tendency, circumstantially or otherwise, to prove criminal intent.” (356 F. 2d at 303. Emphasis added).

There were many other instructions that invited the jury to find appellant guilty because the company or someone else had notice of complaints. A striking example is the instruction given after the complaint file marked Exhibit 2-432 was received in evidence. The court told the jury:

“Ladies and gentlemen, here again this statement as to the complaint is not evidence—it is not offered for the proof—it is not admitted, at least for the proof of the statement, but to show that this complaint *was received by the company*, and you can consider it in considering the information the *company* had relative to complaints, *and intent*” [R. T. 8943. Emphasis added].

When the court received in evidence Exhibit 1-689, it told the jury in unmistakable language that the document could be considered on the question of defendants’ intent *if it came to the attention of the company*:

“The Court: . . . Ladies and gentlemen, this is only admissible insofar as it *came to the attention of Gamble Ranch*, and you can consider it in rela-

tion to the question of *intent on the part of the defendants*. But it is not admissible, and it is not being admitted for the truth of the facts set forth in the Better Business Bureau statement.

As I understand it, the statement was directed to Gamble Ranch and it was received by *Gamble Ranch*, and then they replied thereto.” [R. T. 8867-8868. Emphasis added].

This court in *Phillips* pointed out that at the trial the Government did not contend that defendants had actual knowledge of the complaints and coupons, and that the court admitted the documents on the theory of constructive notice (356 F. 2d at 306). The same is true in the present case. The Government took the position that complaints were admissible against the defendants because the company or someone in the company had notice of them, or because the complaints were found in company files. The court agreed with the Government’s position. The court held that defendants were bound by notice received by someone else. The positions of the court and of the Government were made clear when the Government offered a series of complaint letters sent to Robert McDonald, a Nevada attorney retained by Gamble Ranch [Exs. 3-2051, 3-2060, 3-2059-A, 3-2063, 3-2057, 3-2047, 3-2062, 3-2063, 3-2044, 3-2048, 3-2049, 3-2053, 3-2054, 3-2056. Admitted, R. T. 7528]. As to whether knowledge by McDonald of the complaints could be imputed to the defendants, the court and counsel had the following discussion:

“The Court: Yes, but if he was acting at the instructions of the company, why, it seems to me

he is then acting *as an agent*, unless you have some authority to the contrary.

He is employed by the company to act and he is acting for the company in these capacities as I understand it.

Mr. Rothman: And he receives a letter from an attorney, for example.

The Court: He receives a letter from an attorney, for example.

Mr. Rothman: Yes. Unless there is some evidence, it seems to me, *that knowledge was conveyed to these defendants*—these defendants are not the defendants that hired him.

These defendants are individual defendants, they are not the corporation.

The Court: Then the *whole question is whether the attorney is an agent of the company* and when the company employs him to answer complaints, it seems to me *they are bound by the notice he receives.*" [R. T. 7514-7515. Emphasis added].

\* \* \*

"The Court: . . . However, any of these complaints that came in are not admitted for the truth of the facts contained therein.

Mr. Nissen: They are offered by us, your Honor, to show number one, that the statement was made *to the company* and therefore *they had notice* a complaint was made.

The Court: That is right.

Mr. Nissen: That is the reason.

The Court: *They had notice* of the complaint . . ." [R. T. 7517. Emphasis added].

On another occasion the Government attorney made it plain that he was offering complaint evidence on a theory of constructive notice:

“Mr. Nissen: . . . You see, what we are calling these witnesses for is intent. If, say, five or six witnesses in a row understood the Dukane film strip to say something and they went up there and saw it was not as the film strip said, and perhaps *complained to the company*, as we think these witnesses will show, complained to Mr. Benaron’s, Byrnes’ and Reisman’s *representatives*—in fact, *some* of the complaints even being referred *perhaps* to them—then *you have* notice these things aren’t right.” [R. T. 2300-2301. Emphasis added].

Thus, the Government sought to prove a kind of vicarious criminal intent. The Government had no proof that appellant or the other defendants had actual knowledge of the complaints. The Government attorney speculated that “some of the complaints” were “perhaps” referred to the defendants. But the basis for introducing the complaints was the Government’s contention that the knowledge of “someone in the company,” or of defendants’ “representatives,” or of the Nevada attorney for the company, or merely of “the company,” could be imputed to defendants to establish their criminal intent. The court agreed with the Government’s constructive notice theory. The court’s instructions invited the jury to find appellant and the other defendants guilty because of the intent or knowledge of others. It is too late for the Government to argue that the



jury might conceivably have found that appellant had actual knowledge of the complaints:

“In view of the fact that no appropriate instruction was given on the subject of actual notice and, indeed, that the exhibits in question were not offered and received on such a theory, it is not now open to the Government to contend, alternatively to its constructive notice theory, that exhibits 968 and 984 [the complaints and coupons] were admissible because the jury could have found that each of the appellants had actual knowledge of them.

“We therefore hold that the court erred in admitting these exhibits.” (*Phillips v. United States, supra*, 356 F. 2d at 306).

In some of its instructions the trial court actually told the jury that complaints *did* come to the attention of the defendants. When the court admitted Exhibits 3-415 to 3-550 [R. T. 6337-6338, complaint files reviewed by Attorney Ross], it told the jury:

“The Government offers them as evidence of *the fact that* these complaints *came to the attention* of the defendants.” [R. T. 6333. Emphasis added].

\* \* \* \*

“Now these are offered, as I have already told you, I think on more than one occasion, not for the truth of the facts set forth in the complaints but to show *as evidence of the fact that these complaints were called to the attention* of the defendants, and the jury is to consider them as to the intent of the defendants to defraud or misrepresent.” [R. T. 6337-6338. Emphasis added].

Here the court instructed the jury that the complaints *did* come to the attention of the defendants. The court took from the jury the question *whether they did* come to the defendants' attention. The instructions are plainly erroneous.

“. . . the jury should be told in plain and direct language, that such documents may be considered *only if* it has been *independently* shown that such defendant had *actual knowledge* of the documents while the asserted scheme was in progress.” (*Phillips v. United States, supra*, 356 F. 2d at 306. Emphasis added).

The court's instructions deprived appellant of a jury determination on the issue of his personal knowledge. In addition, the jury was told that the *complaints themselves* were evidence of “the fact that these complaints *were*” (emphasis added), called to the attention of defendants that because there were complaints, the defendants knew of them. That is not the law. Complaints may be considered only “if it has been *independently* shown that such defendant had actual knowledge of the documents. . . .” (*Phillips v. United States, supra*, 356 F. 2d at 306. Emphasis added). And the language “came to the attention” of the defendants, like the words “know,” or “notice,” or “knowledge,” allow the jury to impute to defendant the knowledge of another person in violation of the principles set forth in the *Phillips* case.

There are numerous other examples of the same kind of instruction. In connection with Exhibits 3-415 to 3-550, the court further said:

“These complaints are being admitted to show that these complaints *came to the attention* of

these defendants. That is what the Government is offering them for, *as evidence of that fact.*" [R. T. 6335. Emphasis added].

Again the court told the jury that the complaints themselves are evidence that the defendants had knowledge of them. The erroneous phrase "came to the attention of the defendants" was used many times [See, *e.g.*, R. T. 5957-5959, Exs. 3-296 to 3-414; R. T. 8867-8868, Ex. 1-689].

As mentioned above, in *Phillips* only one short complaint letter was read in evidence (356 F. 2d 301, f.n. 1). The other nine complaints were summarized by the court and the jury was not permitted to see them. In the present case there were hundreds of complaint letters. The letters admitted contained accusations of fraud and misrepresentation in language far more caustic than that in the one letter in *Phillips*. Here all complaints were taken to the jury deliberation room for inspection by the jury. Many were read in evidence [See, *e.g.*: R. T. 3803-3805, 3808, Ex. 2-1172; R. T. 5815, Ex. 3-862; R. T. 3786-3790, Ex. 2-1118; R. T. 6338-6363, Exs. 3-416, 3-419 to 3-423, 3-427, 3-429, 3-432, 3-438 to 3-440, 3-448, 3-459, 3-464, 3-488; R. T. 6370-6377, Exs. 3-506, 3-543]. Appellant's "criminal intent" was proved by such letters although there is no evidence that he ever saw them. The jury was told that appellant could be found guilty of criminal fraud because someone else had seen them. Following are excerpts from only a few of the letters that the jury was permitted to consider against appellant:\*

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\*These excerpts are printed verbatim with no attempt to note mistakes made in the original letters.

“I have just returned from a visit to the town of Montello, Nevada, to see about the property that I had purchased and I feel that I have been a victim of a first grade fraud. This is a misrepresentation of your advertisement and brochures that were shown to me by your salesman, who magnified this transaction out of proportion with distorting facts, pamphlets, and movies.

So, after viewing the property and talking to the local residences of Montello and Wells, Nevada concerning my investment I am taking legal action at once, as I do not intend to continue with this farce any further. . . .” [Ex. 3-2132; Appendix C; Purchaser Gimenez].

“Pursuant to information in the July-August 1962 issue of ‘Real Estate Bulletin’ as follows ‘Brought into court, Johnston pled guilty, was fined \$525.00 and given a 60-day suspended sentence, concurrent with a judicial order to refund all purchase or deposit moneys upon buyer’s requests, etc.

We previously requested refund after having made the trip to the Gamble Ranch and discovered how much it had been misrepresented to us. . . .” [Ex. 3-2132; Appendix C; Purchaser Baker].

“Because the true conditions of water and electricity were misrepresented to us as buyers, I feel that this investment does not warrant further monies. . . .” [Ex. 3-2132; Appendix C; Purchaser Alimonda].

“We have received a statement, upon request, from the BBB, and found it to be a bad investment.

The property was misrepresented to us. Therefore we have a legal right to have all money refunded. . . .” [Ex. 3-2132; Appendix C; Purchaser Araque].

“ . . . we feel that the salesman had made misrepresentations by stating that the soil was rich, fertile soil and water could be obtained at 8 to 20 feet. . . .” [Ex. 3-2132; Appendix C; Purchaser De Marco].

“ . . . All I can tell is that we’ve been taken!

Where money is concerned, we can get pretty blown up, either you show us positive proof of what has been said on your side is true and I mean the whole bit or we too can be funny.

Please prove to us that it is not a fraud, for we had as honest intentions in buying as we hope you had in selling.” [Ex. 3-2132; Appendix C; Purchaser Donovan].

“ . . . Each of my clients feels that there has been a fraud practiced upon them in this matter, and we are informed that your Honorable Commission has declared that the sale of the Gamble Ranch, or portions of the Gamble Ranch, constituted misrepresentation, if not fraud, and that you had ordered them to refund the money that each of the respective purchasers had paid in. . . .” [Ex. 3-2132; Appendix C; Attorney Mackay].

“ . . . I just wonder what and how can we have any faith in this deal when we read a number of times in leading newspapers where your salespeople have misled others. . . .” [Ex. 3-2132; Appendix C; Purchaser Bishara].



“ . . . It’s too bad that we have so many dishonest people in our country that will go to no ends to fraud other people out of their money. . . .” [Ex. 3-2133; Appendix C; Purchaser Tresser].

“ . . . We recently went to see our land and found it quite a joke compared to the brochures we have that the salesman left.

We want our money back and we aren’t going to make trips to your office either as its just something to waste time. Unless we get some satisfaction I’m going to write to the Editors of Times Newspaper (whose article I still have) who stated your company would make refunds. If that doesn’t seem effective there are other ways. . . .” [Ex. 3-2133; Appendix C; Purchaser Oldoerp].

“ . . . Recently I have read too many articles in the California and Nevada papers concerning said land. Do you know this is fraud-misrepresentation of land, etc. and you know what happens to people that makes such rash statements? . . . I am an honest woman and this hurts me deeply to find so many dishonest people in the world. . . .” [Ex. 3-2133; Appendix C; Purchaser Winter].

“ . . . We have seen the property and we are disappointed in this whole matter has been misrepresented by your Investment Counselor that sold this property to us their is a few more property owner that we are going to get together if our money is not returned to us that we have put into this land plus interest and charges. I like to say that we are going to get the backing of State Real Estate Commissioner Wynne A. Savage I have a copie of this letter I would like too here from your

lawyer as soon as possible so I may use this money in a good Investment.

I like to say there is at least a half dozen of us is going to get together to fight if we half to and I hope before were all through we half a lot more on our side. . . ." [Ex. 3-2133; Appendix C; Purchaser Verna].

". . . You and I both know there was misrepresentation as to water—(there is no question on that—you lost a case recently and that was one of the reasons). Shall I go on?

This is our last request for a refund, before seeking legal advice." [Ex. 3-2134; Appendix C; Purchaser Killalea].

Hundreds more complaint letters were received in evidence, all on a constructive notice theory. At no time did the court give the required admonition that the complaints could be considered only if evidence independent of the letters themselves showed that the particular defendant had actual, personal knowledge of them. The errors of the trial court are prejudicial and result in reversal without regard to the sufficiency of other evidence pointing toward guilt. Appellant therefore does not argue the sufficiency of the evidence in this appeal. The court in *Phillips* reversed the judgments of conviction even though:

"The record indicates that there is ample evidence to find appellants guilty beyond a reasonable doubt." (356 F. 2d at 306-307).

The decision of this Court in *Phillips v. United States*, reaffirmed in *Windsor v. United States* (9th Cir. 1967), .... F. 2d ...., No. 19,174, should be followed and the judgment of conviction should accordingly be reversed.

II.

APPELLANT WAS DEPRIVED OF A FAIR TRIAL AND DENIED DUE PROCESS OF LAW BY REASON OF SUPPRESSION OF EVIDENCE IN THE POSSESSION OF THE PROSECUTOR WHICH WOULD HAVE BEEN USEFUL TO THE DEFENSE.

A. The Evidence Suppressed Consisted of California Division of Real Estate Files and Answers to Government Questionnaires in the Possession of the Prosecutor. These Documents Were Requested by the Defense, and the Trial Court Sustained the Prosecutor's Objection to Producing Them. If Produced, These Files and Answers to Questionnaires Would Have Disclosed Evidence Material to the Issue of Guilt or Innocence; They Would Have Provided Information Which Would Lead to the Discovery of Material Evidence; and They Would Have Been Useful to the Defense in Cross-Examining Government Witnesses.

There are two categories of evidence which the prosecutor refused to disclose to the defense. The refusal constituted a suppression of evidence. One category is the investigative files of the Division of Real Estate of the State of California, and the other is answers to government questionnaires. These documents were requested by the defense at various stages before and during trial. On each occasion the prosecutor objected to making disclosure. His objections were sustained by the trial court, and the documents in question have never been disclosed to the defense. Appellant is thus unable to demonstrate the materiality of the evidence or the evidentiary nature of it with particularity. There is, however, a strong probability that these documents

would either contain or lead to the discovery of evidence which would be material to the issue of guilt or innocence, or would have been useful in cross-examining government witnesses, as follows:\*

#### Division of Real Estate Files.

Early in the stages of the Gamble Ranch development, the California Division of Real Estate issued a stop order because there was no public report permitting the sale of the property to California residents. Clejan and his attorney, Allen, were taking the position that no public report was required because of an agricultural exemption. It was about at this time that appellant Reisman entered the picture representing Byrnes and Benaron, who were purchasing interests from Clejan. Reisman immediately took the position that they should cooperate with the Division of Real Estate and obtain public reports. Thereafter applications were made for public reports, and several public reports were issued by the Division of Real Estate.

During the course of issuing the public reports the Division of Real Estate began receiving complaints from purchasers, and the Division of Real Estate made an investigation. Several of the public reports were issued after complaints had been received and after the investigation had begun.

The defendants contended that they had acted in good faith in applying for the public reports and in cooperating with the Division of Real Estate by submitting all information required in connection therewith. They

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\*This portion of the brief is intended to be only a summary statement of the facts which present the suppression of evidence problem. Later in this brief we will discuss the facts in greater detail and with transcript references.

also contended that all of the advertising had been submitted to the Division of Real Estate, and that they were led to believe that the Division of Real Estate had approved the advertising by making corrections in the copy submitted.

In anticipation of this defense, the prosecutor called employees of the Division of Real Estate who testified, in effect, that a public report is issued as a matter of course based on whatever information is submitted by the subdivider. The employees of the Division of Real Estate also said that they had no authority to approve advertising, and they minimized in general the extent to which they had participated in reviewing advertising. With respect to the investigation they were conducting while public reports were being issued, the testimony of the Division of Real Estate was that they had two departments, namely, the public report department and the investigative department, and they said that the public report department would not necessarily know what the investigative department was doing.

Appellant contends that the investigative files of the Division of Real Estate would be relevant to these issues. At the very least, the files would have been useful in cross-examining the employees of the Division of Real Estate. It is also likely that these files would contain documents which would constitute material evidence or lead to the discovery of evidence. The extent to which the advertising copy was reviewed and changed would be reflected by copies of the advertising and other memoranda contained in the files. It is also significant that the Division of Real Estate continued to issue public reports after receiving complaints



and after conducting an investigation. It is unlikely that they would have issued public reports under these circumstances without being satisfied that the complaints were unfounded.

#### **Answers to Government Questionnaires.**

Prior to trial the government mailed out questionnaires to all of the purchasers and prospective purchasers. The questions asked were calculated to determine whether these people thought the advertising was false or misleading or that the property was otherwise misrepresented. At the trial the prosecutor called the witnesses whose testimony was favorable to the government's case. The answers to questionnaires of those witnesses were disclosed pursuant to the Jencks Act. (18 U.S.C.A. 3500.) No other answers to questionnaires were disclosed except when used by the prosecutor in cross-examining defense witnesses.

The defense also called some purchaser witnesses who said that the property was not misrepresented. In cross-examination of one of the defense witnesses the prosecutor used the witness' answer to the government questionnaire. The written answer of this witness was thus disclosed, and it was consistent with the witness' testimony. Appellant contends that the prosecutor's refusal to disclose all other answers to questionnaires demonstrates a strong probability that such documents would disclose the names, addresses and testimony of witnesses favorable to the defense on this issue. This probability is demonstrated further by the incident wherein the questionnaire of the defense witness was produced in cross-examination and proved to be favorable to the defense.

B. It Is Immaterial That the Prosecutor Acted in Good Faith in Disclosing the Fact That He Had the Evidence, and That the Trial Court Sustained the Prosecutor's Objection to Producing the Documents. The Right of the Accused to Have Access to All Material Evidence No Longer Depends on Misconduct of the Prosecutor. The Only Questions Are: Whether the Prosecutor Had the Evidence; Whether He Refused to Produce It on Demand; and Whether It Would Have Been Material.

There is a suppression of evidence whenever the prosecutor fails to disclose to the accused evidence which may be helpful to him. This rule no longer depends upon misconduct of the prosecutor. The only question is whether the prosecutor knew of evidence which was material to the issues of guilt or punishment and whether he failed to disclose it to the defense on demand. This is the holding of *Brady v. Maryland* (1963), 373 U.S. 83, 87-88 [10 L. ed. 2d 215, 83 S. Ct. 1194.] :

"We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

"The principle of *Mooney v. Holohan* is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscrip-

tion on the walls of the Department of Justice states the proposition candidly for the federal domain: 'The United States wins its point whenever justice is done its citizens in the courts.' A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not 'the result of guile,' to use the words of the Court of Appeals. 226 Md, at 427." (*Brady v. Maryland* (1963), 373 U.S. 83, 87-88, [10 L. ed. 2d 215, 83 S. Ct. 1194.]).

The basic concept that the prosecutor may not conceal evidence which may be helpful to the accused was not announced for the first time in *Brady v. Maryland*. This has been the law since at least 1935 when *Mooney v. Holohan*, 294 U.S. 103 [79 L. ed. 791, 55 S. Ct. 340], was decided. Many cases prior to *Brady* recognized and applied the rule that a suppression of evidence by the prosecutor is a denial of due process. All of the pre-*Brady* cases, however, were either expressly or impliedly decided on the theory that there must be some sort of fault on the part of the prosecutor, which could be either deliberate concealment of evidence or negligence in failing to disclose it. For example, in *United States ex rel. Almeida v. Baldi* (3rd Cir. 1952), 195 F. 2d 815, 818, the prosecutor deliberately concealed ballistics evidence by, among other things, instructing one of his witnesses not to mention the fact that a policeman's bullet was found at the

scene of the crime with blood on it. See also: *United States v. Rutkin* (3rd Cir. 1954), 212 F. 2d 641, 644-645 (prosecutor failed to disclose statements of witnesses not called at trial which would have contradicted government witnesses); *United States ex rel. Thompson v. Dye* (3rd Cir. 1955), 221 F. 2d 763, 765 (prosecutor failed to disclose fact that one of the arresting officers would contradict the other, and kept him out of courtroom when the other testified); *Alcorta v. Texas* (1957), 355 U.S. 28, 31 [2 L. ed. 2d 9, 78 S. Ct. 103] (prosecutor told witness not to volunteer certain information when testifying); *Curran v. Delaware* (3rd Cir. 1958), 259 F. 2d 707, 710 (police officer deliberately lied); *Napue v. Illinois* (1959), 360 U.S. 264, 267-268 [3 L. ed 2d 1217, 79 S. Ct. 1173] (prosecutor failed to correct testimony which he knew was false); *Powell v. Wiman* (5th Cir. 1961), 287 F. 2d 275 (prosecutor withheld prior inconsistent statement of government witness and affirmatively represented that prior statement was consistent); *United States v. Consolidated Laundries* (2nd Cir. 1961), 291 F. 2d 563, 570 (prosecutor negligently failed to turn over file which might have been helpful in cross-examining a government witness).

In all of these cases there was some sort of culpability, or at least negligence, on the part of the prosecuting officials. In fact, in one case, *Kyle v. United States* (2nd Cir. 1961), 297 F. 2d 507, 514-515, the court of appeals remanded to the district court to take evidence as to the degree of culpability on the part of the prosecutor. Other pre-*Brady* cases have held that there is no denial of due process under circumstances where the good faith of the prosecutor could not be



questioned. In *Woollomer v. Heinze* (9th Cir. 1952), 198 F. 2d 577, 579, the prosecutor was unaware of the evidence claimed to have been suppressed. This is merely newly-discovered evidence. In *Burwell v. Teets* (9th Cir. 1957), 245 F. 2d 154, 163, and in *Riser v. Teets* (9th Cir. 1958), 253 F. 2d 844, 845, the prosecutor made no secret about the fact that he had the evidence, and the trial court had ruled that he did not have to disclose it.

The distinction between the case where the prosecutor is guilty of some wrongdoing and the case where he withholds evidence in good faith makes no difference to the defendant. The prejudice to the defense in being deprived of the benefit of the information is the same in either case. Since the object of the rule is to insure a fair trial by making all evidence available to the accused, it cannot depend on the motives of the prosecutor. If he has the evidence he must disclose it. He cannot avoid this duty by in "good faith" saying that he has it but will not disclose it. This is the point decided in *Brady v. Maryland*. A failure to disclose the evidence is a denial of due process "*irrespective of the good faith or bad faith of the prosecution.*" (373 U.S. 83, 87 [10 L. ed. 2d 215, 83 S. Ct. 1194.])

The cases since *Brady* demonstrate clearly that good or bad faith on the part of the prosecutor is no longer a consideration. In *United States ex rel. Butler v. Maroney* (3rd Cir. 1963), 319 F. 2d 622, 626-627, the prosecution had a statement of the defendant which related a prior inconsistent statement of the prosecution's chief witness, whose name was Diehl. The prosecutor showed the statement to Diehl when he testified, and marked it for identification, but refused to show it to



defense counsel. And the trial court sustained the prosecutor's objection when the defense asked to see it. Clearly there could be no question but that the prosecutor acted in good faith. But the prejudice to the defense was the same as if the statement had been concealed clandestinely, and it was held that there was a denial of due process. See also: *United States v. Wilkins* (2nd Cir. 1964), 326 F. 2d 135, 139 ("formulation of the duty in terms of willful or wrongful conduct would seem only to confuse here, and is not necessary under the governing law as we understand it."); *Ingram v. Peyton* (4th Cir. 1966), 367 F. 2d 933, 936 ("It is immaterial that this unavailability may have been occasioned by the prosecutor's error in misnaming the prosecuting witness in the indictment rather than by deliberate concealment.")

**C. Statement of Facts Showing That the Prosecutor Had the Evidence; That the Defense Requested It; and That the Prosecutor Refused to Produce It.**

**Division of Real Estate Files.**

On March 10, 1964, over a year prior to trial, the Division of Real Estate of the State of California delivered most of its files with respect to the Gamble Ranch to the federal government pursuant to a Grand Jury subpoena. After the completion of the Grand Jury proceedings, these files were placed in the custody of the Postal Inspector's office [C. T. 900; R. T. 8548-8549]. These files were examined and used by the Postal Inspector in the preparation of the government's case [R. T. 8559-8560]. Prior to trial, the United States Attorney told defense counsel that he had

these files, and pointed them out, but he said that he did not have authority to disclose them without the permission of the Division of Real Estate [R. T. 8569-8570].

On April 6, 1965, the first day of trial, the defense served a subpoena on the Division of Real Estate to produce all of their Gamble Ranch files [C. T. 907]. On the following day some files which had been retained by the Division of Real Estate were produced, but the files in the possession of the prosecution were not produced [R. T. 928-929].

On May 18, 1965, during cross-examination of a prosecution witness, George Poppe, who was an investigator of the Division of Real Estate, the defense asked again to see the files\* [R. T. 7276]. The files again were not produced, and instead a representative of the State Attorney General's office appeared later in the day and objected to production of the files on the ground that some of them were privileged [R. T. 7338-7340]. The court did not rule on the objection at that time, but asked the State Attorney General to examine the files and specify which of them he claimed were privileged [R. T. 7341].

On May 25, 1965, the Attorney General appeared again and filed a motion to quash the subpoena which had been served on April 6, 1965 [C. T. 894; R. T. 8544]. The papers in support of the motion specified the categories of documents which were contained in the files, designating them by letters as A through L.

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\*There had been a previous request for the files during cross-examination of John Block, who was the head of the Los Angeles office of the Division of Real Estate [R. T. 7164]. The matter was deferred at that time [R. T. 7170].

Of these categories, G through L, were claimed to be confidential and privileged, and were specified as follows:

“G. Letters of inquiry and complaint from purchasers of Gamble Ranch property and other persons; (with documents and advertising material connected thereto);

“H. Statements and affidavits of purchasers of Gamble Ranch property and other persons relating to said Gamble Ranch and persons connected therewith;

“I. Replies to letters of complaint and inquiry prepared by personnel within the Division of Real Estate.

“J. Internal memoranda ‘to the files’ of the Division of Real Estate and internal memoranda for distribution within the Division of Real Estate prepared by the personnel of the Division of Real Estate relating to said Gamble Ranch and persons connected therewith;

“K. Memoranda to and received from other governmental [sic] state governmental agencies concerning said Gamble Ranch and persons connected therewith; and

“L. Memoranda to and received from federal government agencies concerning said Gamble Ranch and persons connected therewith.” [C. T. 895-896].

The argument made in support of the motion to quash was directed primarily to the question of whether

the documents were privileged. The trial judge was not impressed with this argument as the files had been used by the Postal Inspector in the preparation of the government's case, and so any privilege of the Division of Real Estate had been waived [R. T. 8544-8570]. The court ruled, however, that the subpoena was too broad, and that there was no showing that the documents had "evidentiary" value [R. T. 8788-8792]. The defense thereafter served another subpoena specifying the documents with greater particularity, but the court again ruled that the defendants had not shown the evidentiary value of the documents which they had never seen [R. T. 8792-8793].

The ultimate disposition of the matter was that the judge ordered the United States Attorney to give the defense any documents which related to the direct examination of the witness Poppe. The only thing produced in this regard was a single two-page document [R. T. 8720-8271]. All others were sealed and marked for identification. A few of the files which had been shown to the judge and which were in the courtroom were marked as Court's Exhibits 2 A through 2 G. The balance of the files consisting of three boxes of documents remained in the custody of the United States Attorney's office, and were later brought to the courtroom and marked as Government's Exhibits 2-1301-A, 2-1301-B, and 2-1301-C [R. T. 8919-8921]. None of these files was ever shown to the defense. At the time the files were ordered sealed, the United States Attor-

ney made it clear that he would never disclose their contents. He said:

“Mr. Nissen: But the contents you will never know what is in it.” [R. T. 8922, lines 20-21].

#### **Answers to Government Questionnaires.**

On November 14, 1963, over a year prior to trial, the United States Attorney sent questionnaires to the purchasers and prospective purchasers of property in Gamble Ranch. The questionnaires were accompanied by a letter. The letter stated that an official investigation by the Department of Justice and the Post Office Department was in progress. The addressees were asked to answer the questions in as much detail as possible and to “treat this communication as confidential”. An example of the letter is in evidence as Defendants’ Exhibit BV, and an example of one of the questionnaires is marked for identification as Government’s Exhibit 2-1291. For convenience, these Exhibits have been reproduced in the Appendix E to this brief.

Herein it should be noted that all of the questionnaires were not withheld. A few of them were produced either as government witnesses testified pursuant to the Jencks statute (18 U.S.C.A. 3500); or during cross-examination by the prosecutor of defense witnesses. No question is raised as to the questionnaires which were produced. The problem lies in the fact that the prosecutor refused to show the hundreds of others which likely would have led to the discovery of witnesses who would have been favorable to the accused.

The existence of the questionnaires was known to the defense prior to trial, and so they were requested prior



to trial during argument on the motions for bills of particulars [R. T. 264]. The court made it clear that it would not require the prosecutor to produce the questionnaires:

“The Court: I will rule on that right now. So far as questionnaires go that they send out to witnesses, my ruling is you are not entitled to them. That is just their investigation, and it is the same thing as though they went out and interviewed the witness and had a statement of the witness. It is the same thing, in my judgment.” [R. T. 265].

Later during the same argument another counsel brought up the matter of the questionnaires again. It then appeared that the trial judge may have misunderstood the situation, and he indicated that he would reconsider it [R. T. 316-317]. But when the court finally settled the motions for bills of particulars he did not give the defense the opportunity to see the questionnaires [R. T. 479-544].

At the pretrial hearing the matter came up again with respect to inspection of government documents generally. Defense counsel pointed out that the government had six or seven cabinets marked “Closed”. The prosecutor stated emphatically that these were his cabinets and he would not even discuss their contents, but then added that they contained “questionnaires and things like that.” [R. T. 360].

This refusal to disclose the questionnaires persisted throughout the case. Toward the end of the trial the prosecutor called the Postal Inspector in rebuttal, and he tried to make it appear as if no evidence had been withheld from the defense [R. T. 14,201-14,202]. On

cross-examination the defense pointed out that a good deal of material had not been made available and specifically mentioned the questionnaires [R. T. 14,211.] The prosecutor admitted that the government never said that all of the questionnaires would be shown—only the ones with respect to witnesses who testified. He said: “There are many things we haven’t shown to them.” [R. T. 14,211-14,212].

#### **D. The Materiality of the Evidence and Its Evidentiary Nature.**

To what extent must the defendant show that the evidence which he has never seen is material and evidentiary in order to be entitled to have access to it in defending himself at trial? In many cases this is not a problem because the evidence is in fact disclosed or discovered after trial and everyone knows what it is. In *Brady v. Maryland* (1963), 373 U.S. 83 [10 L. ed. 2d 215, 83 S. Ct. 1194], it was discovered after conviction that the prosecution had an unsigned statement from the accomplice, Boblitt, wherein Boblitt admitted that he and not Brady had killed the victim. Thus, there was no mystery about what the evidence consisted of and what it would prove. It was an unsigned statement which contained a statement material to the issue of punishment in Brady’s case.

The situation is obviously different when the defendant never gets to see the evidence. Surely the prosecutor’s duty to disclose all material evidence cannot be avoided by withholding the evidence and making it impossible for the defendant to say exactly what it consists of and how it could be used. In this type of case the defendant cannot be expected to demonstrate

the nature of the evidence with particularity. The most he can show is a probability or likelihood that the thing he seeks is evidentiary and material. In *United States v. Rutkin* (3rd Cir. 1954), 212 F. 2d 641, 644-645, the defendant claimed, on appeal from a conviction of income tax evasion, that the prosecutor had suppressed a statement which it had obtained from a person named Zwillman. Zwillman was not called as a witness at the trial, but the defendant claimed that the Zwillman statement, which he had never seen, would have contradicted the testimony of one of the government's witnesses who was called. The court of appeals noted that the defendant could not allege the contents of the statement with any greater particularity because he had never had access to the statement. The case was remanded to the district court with directions to order the United States Attorney to produce the statement and to determine its materiality. In *Ellis v. United States* (D.C. Cir. 1965), 345 F. 2d 961, 962, the defendant appealed from a manslaughter conviction. He had struck the victim on the head with a board, and the victim died six days later. Proximate cause was the issue. The defendant testified that when he was arrested one of the officers told him that on the night he hit the victim the victim had gone to a hospital and had been released the same night. There was no other evidence on the subject, and the arresting officer who was supposed to have said this was called as a witness but was not asked about it. Nevertheless, the court of appeals held that there was enough of a probability of relevant evidence by way of hospital records to remand the case to determine whether the prosecutor had such evidence and whether it was material.

It is also not an inflexible rule that the thing in question must be admissible in evidence in any and all events in order to be "evidentiary". In many cases there is no physical document or thing which the prosecutor withholds. It is often only information such as the name of a witness. For example, in *United States ex rel. Meers v. Wilkins* (2nd Cir. 1964), 326 F. 2d 135, 136, the defendant claimed an alibi, but was convicted on the testimony of two eyewitnesses who identified him. There were two other eyewitnesses at the police lineup who could not make positive identification. The denial of due process was in failing to tell the defendant about the witnesses so that he could call them if he saw fit.

If the prosecutor does have a written statement, the statement must be disclosed even though it could not necessarily be used in evidence as such. In *United States v. Rutkin* (3rd Cir. 1954), 212 F. 2d 641, 644-645, the prosecutor had a statement from a person named Zwillman. Zwillman was not called as a witness. Suppose the government had given Rutkin's lawyer the Zwillman statement. What would he do with it? He could not merely put it in evidence. He would have to call Zwillman as a witness. If Zwillman testified consistently with his statement, the statement would never get into evidence. If Zwillman contradicted his statement, the prosecution might use it, but the fact remains that *prima facie* the statement was not evidence.

*Brady v. Maryland* (1963), 373 U.S. 83 [10 L. ed. 2d 215, 83 S. Ct. 1194] also illustrates that documentary evidence need not necessarily end up as admissible evidence. The facts of the *Brady* case on this point



are not set forth in the opinion of the United States Supreme Court, but are found in the opinion of the Maryland court of appeals (*Brady v. State* (1961), 226 Md. 422 [174 A. 2d 167]). The Maryland court held that Boblitt's unsigned statement might have been used in evidence as an admission against interest if Boblitt had been called but could not be compelled to testify because of his privilege against self-incrimination. But even in that event, the writing itself would not be evidence. Since the statement was unsigned, the evidence of it would be the testimony of the person who took the statement.

In *United States v. Consolidated Laundries Corp.* (2nd Cir. 1961), 291 F. 2d 563, 569-570, a file (therein referred to as the "Owen file"), had been withheld in an anti-trust case. It was not even suggested that the file might have been put in evidence. It was sufficient that the file might have been useful to the defense in cross-examination. The court said:

"It is, of course, impossible to know whether the result of the trial would have been different if defense counsel had had the Owen documents. No one can tell what might have developed had the government's principal witness been confronted with them during cross-examination, or if certain of the documents had been available to refresh his recollection about facts which he did not remember and which, if elicited, might have been helpful to the defendants."

Other cases indicate clearly that admissibility of the evidence is not the test at all. The important thing is the disclosure of information which may lead to the discovery of evidence. In *Ingram v. Peyton* (4th Cir.



1966), 367 F. 2d 933, 936, the prosecution failed to disclose to the defense the information that the chief prosecution witness had a prior perjury conviction. The information which should have been disclosed was not evidence. But with that information defense counsel might have asked the witness about it, and he could have obtained an authenticated copy of the record of conviction to put in evidence if the witness denied it. In *Giles v. Maryland* (1967), 386 U.S. 66 [17 L. ed. 737, 87 S. Ct. 793], which was a rape case, a majority could not agree on an opinion as there were differing views as to what it was that constituted the suppression of evidence. Three Justices (Brennan, Warren and Douglas) held there was suppression in failing to disclose a police report. Justice White felt that the defense should have been told that the prosecutrix had undergone a psychiatric examination, in which event the defense might have called the doctor on the question of the witness' credibility. Justice Fortas was also concerned with the credibility issue. He held that there was a denial of due process in failing to tell the defense that the prosecutrix had on another occasion claimed rape and then withdrawn the charge, and that she had attempted suicide. The only thing involved that might have constituted admissible evidence in and of itself was the police report. But its value to the defense was not limited to its evidentiary nature in the sense of being admissible in evidence. It could have been of value in leading to other evidence. The court said:

“There can be little doubt that the defense might have made effective use of the report at the trial or in obtaining further evidence.” (17 L. ed. 2d at 745).

Tested by these principles, we submit that there is a strong probability that the documents in question in this case would disclose material evidence, information which would lead to material evidence, or information which would be useful in cross-examination. The California Division of Real Estate files would be useful in cross-examining the employees of the Division of Real Estate; they would contain copies of advertising material and other documents showing the extent to which the Division of Real Estate reviewed the advertising; and they would disclose evidence or information leading to evidence bearing directly on complaints of purchasers. The answers to government questionnaires would disclose the names, addresses and testimony of purchasers who thought that the advertising was not misleading and that the property was not misrepresented.

#### **Division of Real Estate Files.**

Appellant Reisman testified extensively to the effect that he and the other defendants had relied upon the issuance of public reports by the Division of Real Estate, and that he had not only taken pains to review and correct the advertising himself or to see to it that this work was done by other attorneys, but that all advertising was submitted to the Division of Real Estate and that all corrections required by the Division of Real Estate were made. When Reisman first became involved with the Gamble Ranch in the Fall of 1959, he talked to John Block, who was the head of the Los Angeles office of the Division of Real Estate, in connection with the stop order. At that time Reisman says Block told him: "There are some obligations about the advertising." [R. T. 12,948]. Thereafter Reisman agreed with

Attorney Allen that they would divide up the work. Reisman would handle the applications for public reports, and Allen would clear up the advertising [R. T. 13,048-13,049]. Later, Reisman talked to Mr. Bircher, who was in charge of advertising at the Division of Real Estate. Reisman says Bircher told him that the advertising had been cleared to his satisfaction. Reisman says he kidded Bircher about how persnickity they had been in requiring changes, and that Bircher more or less agreed with him and said: "Well, we just put in everything we could think of." [R. T. 13,049-13,050]. Reisman said that he discussed the advertising with Bircher several times. He said that on one occasion Bircher told him that he was satisfied with the advertising and that it was accurate and correct [R. T. 13,071]. On still another occasion Reisman says Bircher told him he was satisfied with the advertising [R. T. 13,392].

Later Bircher died and the duties of reviewing advertising in the Division of Real Estate were taken over by Lee V. Sida [R. T. 1389]. On one occasion Reisman made an appointment for John Roche to see Sida [R. T. 13,066]. Roche was an advertising consultant employed by the Gamble Ranch organization [R. T. 1145-1148]. Reisman said that Roche was told to submit all advertising to the Division of Real Estate, and that the Division of Real Estate was constantly reviewing advertising [R. T. 13,372-13,375]. Reisman said that he advised his clients, Byrnes and Benaron, that in addition to his own screening of the advertising, it was being reviewed and revised by the Division of Real Estate, and that they could rely on such approval [R. T. 13,377].

Roche was called by the prosecution, but he corroborated the position of the defendants that the advertising had been reviewed and revised extensively by the Division of Real Estate. Roche had had approximately 51 years experience in handling advertising [R. T. 1145]. While he did not necessarily specialize in land development advertising, he had been engaged in this type of advertising since 1915, it was a large percentage of his business, and his agency was one of the largest in the United States dealing with the production of land brochures [R. T. 1361-1365]. He said that it was the practice of the Division of Real Estate to approve and disapprove advertising, especially in land development cases [R. T. 1170]. He said that he had been instructed to submit all advertising to the Division of Real Estate [R. T. 1168]. Roche said he reported to Clejan that Bircher had been cooperative, but harsh, in requiring changes, and that he had made the changes requested [R. T. 1173-1174, 1242-1244]. Roche said he never tried to talk the Division of Real Estate out of making changes, but always revised the advertising in accordance with their wishes [R. T. 1382]. Roche said that Reisman told him to see Sida about the Victor Gruen report [R. T. 1306]. He said that Sida did not expressly approve or disapprove the advertising based on the Gruen report, but that he suggested changes which were made [R. T. 1389-1396]. Roche said that Reisman submitted the first four-color brochure to Sida. Roche said he had it picked up at Sida's office, and that there were corrections on it which were adopted [R. T. 1399-1403].

With respect to public reports, Reisman said that when he became aware of the stop order he immediately



took the position that the company should cooperate with the Division of Real Estate and apply for public reports [R. T. 12,954]. He personally handled the applications for public reports and saw to it that all information requested was submitted to the Division of Real Estate [R. T. 12,993-13,047]. Reisman said he was not aware of the fact that the Division of Real Estate was conducting a fraud investigation [R. T. 13,302-13,303]. Block, the head of the Los Angeles office, admitted he did not tell Reisman that the investigation was being conducted, and he admitted that three public reports were issued while this investigation was pending during the years 1961 and 1962 [R. T. 7130-7132]. Reisman was asked whether he had any belief as to whether the Division of Real Estate would issue public reports while they were investigating for fraud. He said it would not make any sense to do that [R. T. 13,307]. He said that Mr. Scholfield, another employee of the Division of Real Estate, had told him that they would not issue a public report until after they had determined that the property could be used for the purpose for which it was being sold [R. T. 13,358-13,359]. On still another occasion Reisman was contemplating filing a registration statement with the Securities and Exchange Commission, and he specifically inquired whether the company was in good standing with the Division of Real Estate. Reisman said Scholfield told him they were in good standing [R. T. 13,195]. He said Block told him the same, and that there were no complaints against the company [R. T. 13,197].

The testimony of John Block was in sharp contrast. His position with respect to advertising was that the Division of Real Estate had no authority to approve or



disapprove, that the extent to which they even saw advertising was much less than contended by the defendants, and that they made no changes in any advertising copy. He said that Roche showed him a brochure at one time and asked for his opinion. But he said that he told Roche that he had no basis to examine it, that he would look at it only to see if anything was blatantly false, and that he never told Roche that any advertising was cleared or that it met with approval [R. T. 7061-7062]. Block said that he told Roche that he had no authority to approve advertising, and that no changes were made in the brochure that was submitted [R. T. 7112-7114]. He said that the only other advertising reviewed by the Division of Real Estate was advertising which they might read in the newspapers, and the advertising was not reviewed at the request of the company [R. T. 7063-7064]. Block said they did not pass on the original advertising in 1959, and only made comments on ads that they saw in the newspapers [R. T. 7073-7074]. He said that Roche had approached Sida with a brochure, but that Sida had told him the same thing, that he had no authority to approve advertising. Block said that Sida made no changes in the brochure, and only turned it over to their investigative section [R. T. 7115].

Block testified in effect that there was no correlation between the fraud investigation they were conducting and the issuance of public reports. Block said that there were two sections in the Division of Real Estate, the investigative section and the subdivision reporting section [R. T. 7039]. He said the subdivision reporting section accepted at face value the questionnaires and supporting letters submitted by the subdivider [R. T.

7042]. A deputy would inspect the property and make a report, and the public report would then issue [R. T. 7043-7045]. There was no liaison with the investigative section unless the investigative section had filed a formal action [R. T. 7046]. He said no public report would ever be withheld on the basis that an investigation was pending [R. T. 7047]. He said the requirements for a public report were very minimal [R. T. 7072]. The public report would be issued as long as the requirements of the questionnaire were met [R. T. 7097]. Block admitted that he was the head of the office and so knew what both sections were doing, but he said he would not advise the report section that an investigation was pending unless there was a formal action [R. T. 7116]. Block admitted that Reisman made inquiry as to the standing of the company with the Division of Real Estate when he was getting ready to file a registration statement with the Securities and Exchange Commission, but when asked whether he told Reisman there was nothing wrong with the Gamble Ranch, he said that he "never advised him in that context." [R. T. 7128-7132]. Later, when asked about this again, Block specifically denied telling Reisman there were no complaints against the company [R. T. 7181-7182].

George Poppe was the Division of Real Estate employee who conducted the investigation. He said he checked with Sida about his review of advertising, but could not recall whether he made any written report about this [R. T. 7235-7236]. Later, he said that in talking to Sida, he learned that Sida had submitted some advertising to his superior, Harrington, who had made pencilled notes on the advertising material. Poppe

said, however, that all he wanted to know was whether Sida had approved or disapproved, and he was satisfied with his statement that he had not [R. T. 7290-7294].

Sida said that he could recall only one piece of advertising with respect to Gamble Ranch, and that was a newspaper ad referring to the Victor Gruen plan [R. T. 14,149-14,152]. He said he discussed this with Roche, and that was the first and last time he had even heard of Roche [R. T. 14,153-14,154]. He said he did not approve any brochure and had no authority to do so [R. T. 14,154]. He said he could not recall ever having talked to Poppe about advertising [R. T. 14,-168].

We submit that there could not be a clearer case of conflicting testimony. Reisman contended that he acted in good faith because he cooperated with the Division of Real Estate, furnished all information required, and obtained public reports. The Division of Real Estate, on the other hand, said there is no justification for such reliance. They accept whatever information that is submitted to them, and they issue the reports as a matter of course. Reisman said it would not make sense to do that when a fraud investigation was pending. The Division of Real Estate said that has no significance. These are separate sections of the Division of Real Estate, and neither knows what the other is doing.

The company advertising was the very heart of the case. In this area the testimony was hopelessly conflicting. Reisman said all of the advertising was submitted for approval. The Division of Real Estate denied this. They would admit only to seeing a few scat-

tered items and reading of newspaper ads. Reisman said they did express approval on some occasions and at least implied approval on others by making changes in the advertising copy. This was flatly denied, and Sida even denied talking to Poppe about advertising when Poppe said that he had talked to Sida and may have even made a written report about it.

These conflicts in the testimony were all on material matters. But even if the conflicts had been with respect to immaterial matters, they clearly raised a credibility question which was important. In *Curran v. Delaware* (3rd Cir. 1958), 259 F. 2d 707, 712, the evidence suppressed was one of the statements made by the defendants to the police. The defendants claimed they had made two statements, and the police claimed they had made only one. The differences in the statements were not particularly important. The important thing was that this conflict created a credibility gap between the defendants and the police. The jury is more likely to believe the police, and if they disbelieved the defendants on this point as to how many statements there were, they would be likely to disbelieve them on other material points.

The defendants in this case were placed in the same position. Is there any question of who the jury is likely to believe as between a lawyer for the company and supposedly disinterested officials of the State Division of Real Estate? The credibility of the Division of Real Estate officials was extremely important. Surely there is something in their files which would have been useful to the defense in cross-examining them.

But the conflicts in the testimony were not on immaterial points. It was an important issue whether all



of the advertising had been submitted to the Division of Real Estate. Whether or not the Division of Real Estate actually made changes in the copy would be strong evidence of their approval. It is hard to believe that they were conducting a fraud investigation and at the same time issuing public reports unless their investigation showed that there was no fraud. This admitted fact alone, notwithstanding Block's statement that one section would not know what the other was doing, is enough to make anyone curious as to what is in those files.

#### **Answers to Questionnaires.**

There is also a strong probability that some, if not all, of the hundreds of undisclosed answers to government questionnaires will contain statements of witnesses which will contradict the government purchaser witnesses. To a man, each of the government purchaser witnesses testified in substance, if not in so many words, that the property was misrepresented, and they also so stated in their questionnaires. There can be no doubt that this was an important issue and that this was damaging evidence. With nothing more, is it not at least peculiar that the prosecutor was so determined to withhold all of the other questionnaires? What possible reason could he have? There is only one reasonable inference that can be drawn. The other questionnaires are probably not favorable to the government, and conversely they are likely to contain statements favorable to the accused.

The probability of favorable evidence in the undisclosed questionnaires is not a mere possibility. As noted earlier, some questionnaires were disclosed in two



ways: (1) pursuant to the Jencks statute (18 U.S.C.A. 3500) as the government witnesses testified; and (2) in cross-examination of defense witnesses. The one which is reproduced in the appendix, and marked for identification as Government's Exhibit 2-1291, is in the latter category. (See Appendix E.)

This statement was made by Walter Garrick. Mr. Garrick's wife was called by the defense. She was an excellent witness for the defense. She stated flatly that the property was not misrepresented. She said: "If anything it was better than I had expected it to be." [R. T. 9941]. On cross-examination the prosecutor produced the Garrick questionnaire. He first established that, although it was signed only by Mr. Garrick, Mr. and Mrs. Garrick had filled it out together. He then pointed out that there were various statements in the questionnaire such as that a salesman had said that there was water at 10 to 35 feet or more [R. T. 9980-9984]. There are many other statements in the Garrick questionnaire which the prosecutor apparently considered unimportant, as he did not ask Mrs. Garrick about them. They are as follows:

Page 7, paragraph IV D:

"D. Was the appearance of any of the above items (that you saw) what you thought it would be?

*Yes* If yes, which items?

*All of it was what we had expected it to be."*

Page 8, paragraph V E:

"E. Have you made any complaint, or request for a refund or cancellation? *No.*"

Page 9, paragraph VI A:

“VI. Have you made any effort to ascertain whether or not the land you purchased was fairly represented by the salesman and sales material? *Yes—we went there.* If so, what effort?

“A. Do you feel that the land was: (Check approximate box)

1. Accurately represented ☒
2. Misrepresented ☐
3. Other (specify) .....

Page 10, paragraph VII:

“VII. Please furnish any comments concerning your dealing with or knowledge of Gamble Ranch which you feel would be helpful to this inquiry.

“So far as we are concerned, we know about what to expect—we knew the property was undeveloped, but felt—and still feel—that the potential is there. It is in a very beautiful setting of mountains, and when we were there in August the temperature was very pleasant. Although we did not buy the property with the intention of living in Montello, we thought it a good investment.”

The cross-examination of Mrs. Garrick was certainly ineffectual, and probably it was unfair. But we are not here arguing the effectiveness or fairness of the attempt to impeach Mrs. Garrick. The point is this: The prosecutor had this questionnaire long prior to trial. He knew that Mrs. Garrick was a witness favorable to the accused and that she would materially contradict

his other witnesses. Yet he did not call Mrs. Garrick; he did not tell the defense about Mrs. Garrick; he did not even tell the defense he had a statement from Mrs. Garrick. Fortunately the defense found Mrs. Garrick on their own, and so do not complain that they were deprived of the benefit of her testimony. But how many other witnesses are there like Mrs. Garrick who have given similar statements known only to the prosecutor? The conclusion is inescapable. The prosecutor has suppressed a considerable amount of evidence in failing to disclose the questionnaires, and there is a strong probability that some, if not all, of this evidence would be favorable to the accused.

**E. None of the Objections Made to Producing the Evidence Was Valid.**

Three arguments were made in opposition to disclosure of the Division of Real Estate files: The State Attorney General argued: (1) That the documents were privileged; and (2) that the defense had not shown that the documents were evidentiary [C. T. 896, 897]. The prosecutor argued: (3) That he was not required to disclose the files as his duty was only to furnish statements of his witnesses pursuant to the Jencks Act [R. T. 8553-8556]. The argument made with respect to the answers to government questionnaires was apparently also based on the Jencks Act. Whenever the matter came up, either the court or the prosecutor stated, in effect, that disclosure of witness statements would be required only in cases where the witness testified for the government [R. T. 264-267, 316-317, 360-361, 14,211-14,212].

### Privilege.

The trial court indicated that it was not sustaining the privilege argument [R. T. 8544-8570, 8788-8792]. The claim of privilege was based on California *Code of Civil Procedure* §1881, subd. 5, which is California's codification of the informer's privilege. It provides that "A public officer cannot be examined as to a communication made to him in official confidence, when the public interest would suffer by the disclosure." Since the statute speaks only of statements made *to* the officer, it clearly would not cover all of the material in the Division of Real Estate files (*Crosby v. Pacific S.S. Lines* (9th Cir. 1943), 133 F. 2d 470, 475). There was also no proof whatever that the files were in fact confidential or that the public interest would suffer by disclosure (*City and County of San Francisco v. Superior Court* (1951), 38 Cal. 2d 156, 163 [238 P. 2d 58]). The most obvious deficiency in the privilege argument was that there was a waiver in giving the files to the federal government without objection in response to the Grand Jury subpoena (*Markwell v. Sykes* (1959), 173 Cal. App. 2d 642, 648-649 [343 P. 2d 769]). In fact, there was more than a waiver of privilege. The state had actually surrendered the files to the federal prosecutor. After the Grand Jury proceedings the files did not remain with the Grand Jury, and they were not returned to the state. They were delivered to the Postal Inspector for preparation of the government's case, and the Postal Inspector in fact so used them [R. T. 8548-8560]. Even when a subpoena was served at the com-

mencement of the trial, the state made no objection. They produced such files as they still had without objection, and made no mention of the others because they did not have them.

The truth of the matter is that these files were not in the possession, custody or control of the Division of Real Estate at all. At all times material they were in the hands of the prosecutor. He did not even bring them down to the courtroom until he was sure that they would be sealed and that the defendants would never see them. The only reason for the subpoena directed to the state was to overcome the prosecutor's initial claim that he had no control of the files. After the State came in and argued its privilege objection, and when it became apparent that this did not impress the trial judge, the prosecutor had to abandon his position of neutrality. He said that he was not required to disclose anything except statements of his witnesses pursuant to the Jencks Act. He claimed there was nothing evidentiary in the files and so the defense had no right to anything but Jencks Act statements [R. T. 8553-8554]. And this was the way the court ruled. The only thing disclosed was one two-page memorandum which was claimed to be the only thing relating to Poppe's direct examination. As to all the rest, three boxes full, the court accepted the prosecutor's statement that there was nothing evidentiary in those files.



### Jencks Act.

The Jencks Act is not applicable by its terms to the Division of Real Estate files. The Jencks Act deals only with statements or reports made by government witnesses or prospective government witnesses to agents of the government (18 U.S.C.A. 3500, subd. (a)). Herein we need not concern ourselves with whether the Division of Real Estate files may contain statements of government witnesses or prospective government witnesses. Being state files, it is a certainty there are no statements made to agents of the federal government.

The Jencks Act is also not applicable to the undisclosed answers to government questionnaires. It applies only to statements of government witnesses or prospective government witnesses. The statements which the defendants seek are those made by people who will say that the advertising was not false and that the property was not misrepresented. These are not prospective government witnesses. They are prospective defense witnesses.

But even if the Jencks Act were held applicable, it cannot be constitutionally applied to a suppression of evidence case. *Brady v. Maryland* and all other suppression of evidence cases are based on the due process clause of the Constitution. Congress could not by the Jencks Act or any other statute authorize the prosecutor to suppress evidence helpful to the accused. If this were permissible, then the Jencks Act would be a very

effective weapon of the prosecutor. In the case of a prospective witness whose testimony favored only the accused, he would not call the witness at all. He could withhold the statement because the Jencks Act requires disclosure only after the witness has been called by the United States and has testified on direct examination (18 U.S.C.A. 3500, subd. (b)). In the case of a witness whose statement contains things helpful to both sides, the prosecutor would limit (or attempt to limit) his direct examination to the matters helpful to the government's case. In that event he must produce the statement, but if he has been able to limit the direct examination, he can have the court excise the parts that are favorable to the accused (18 U.S.C.A. 3500, subd. (c)). In fact, it appears that this is exactly what the prosecutor did in the case of the witness George Poppe. On direct examination the prosecutor attempted to limit Poppe's testimony to certain specific subject matters, one of which was a meeting with some of the defendants and their counsel in June of 1962 [R. T. 7198-7229]. On cross-examination the witness was asked for his notes. These notes were not a statement made to the government, but were notes which the witness had in his hands. The witness handed them to defense counsel, but before they could be examined, the prosecutor had the court excise everything except that which pertained to the direct examination about the meeting [R. T. 7229-7233]. When it came to taking a look at the Division of Real Estate

files, the prosecutor also obtained excision of everything except a two-page memorandum which he claimed was the only thing relating to Poppe's direct examination [R. T. 8720-8721].

We submit that the Jencks Act argument cannot withstand analysis. The courts have held consistently and repeatedly that suppression of evidence by the prosecution is a denial of due process. Neither the Jencks Act nor any other statute can change that. The only questions are whether the prosecution has evidentiary material favorable to the accused, and whether he failed to disclose it on request to do so. Here there is no question but that the United States Attorney had the Division of Real Estate files and answers to questionnaires, and that he refused to disclose them to the defense when requested to do so. The only question there can be is whether the files and answers in fact contain evidence favorable to the accused. Since the documents have never been disclosed, the defendants are only required to show the probability of the existence of the evidence. It is further not a requirement that the documents be admissible in evidence as such. It is sufficient if they contain information which would be useful in cross-examining government witnesses or if they contain information which would lead to the discovery of admissible evidence.

Because of the suppression by the prosecution of this valuable evidence, the judgment of conviction should be reversed.

### III.

#### PRONOUNCED AND PERSISTENT ACTS OF MISCONDUCT BY THE PROSECUTOR DEPRIVED APPELLANT OF A FAIR TRIAL AND REQUIRE REVERSAL.

The transcript is studded with numerous acts of the prosecutor's misconduct, the effect of which was necessarily to deprive appellant of his right to a fair trial.

Appellant does not make this contention lightly. A review of the authorities shows that the different kinds of prejudicial misconduct committed by prosecutors in the past is as unlimited as the imagination of man. Almost every one of the multitudinous varieties of misconduct condemned in the cases occurred here:

Improper and prejudicial statements in putting questions to witnesses; *Berger v. United States*, 295 U.S. 78, 79 L. ed. 1314, 1319-1321; Wigmore, *Evidence*, §1808 (McNaughton Rev. 1961) and cases cited therein; *People v. Parmelee*, 138 Cal. 123 (1934); *People v. Tucker*, 164 App. 2d 624, 628 (1958).

Adducing inadmissible material for the jury's consideration by the use of insinuating questions; *Berger v. United States*, 295 U.S. 78, 79 L. ed. 1314, 1319 (1935); *People v. Fox*, 126 Cal. App. 2d 560, 570 (1954).

Suggesting by questions the existence of facts in respect of which no proof was offered; *Berger v. United States*, 295 U.S. 78, 79 L. ed. 1314, 1319 (1935); *People v. Hamilton*, 60 Cal. 2d 105, 116 (1963).

Going very far afield in cross-examination beyond the direct examination to discredit a witness by questions asked in bad faith as shown by failure to prove the affirmative after having received a negative reply in answer to the question; *Berger v. United States*, 295 U.S. 78, 79 L. ed. 1314, 1319 (1935); *People v. Hamilton*, 60 Cal. 2d 105, 116 (1963), *United States v. Perlstein*, 120 F. 2d 276, 283-283 (3d Cir. 1941); *United States v. Haskell*, 327 F. 2d 281 (2d Cir. 1964).

Improper and incorrect statement of facts in the argument of the case; Wigmore, *Evidence*, §1806 (McNaughton Rev. 1961); *People v. Love*, 56 Cal. 2d 720 (1961); *Viereck v. United States*, 318 U.S. 236, 247, 87 L. ed. 734, 741 (1943); *Dugan Drug Stores, Inc. v. United States*, 326 F. 2d 835 (8th Cir. 1964).

Impeachment of witnesses by methods obviously known to prosecutor to be improper; *People v. Hamilton*, 60 Cal. 2d 105, 116 (1963).

Direct attacks on the integrity of defense counsel; *Berger v. United States*, 295 U.S. 78, 88, 79 L. ed. 1314, 1321, 55 S. Ct. 629 (1935); *New York Central R. Co. v. Johnson*, 279 U.S. 310, 316-318, 73 L. ed. 706, 710, 49 S. Ct. 300 (1929).

Appeals to passion and prejudice of the jury; *Viereck v. United States*, 318 U.S. 236, 247, 87 L. ed. 734, 741 (1942); *New York Central R. Co. v. Johnson*, 279 U.S. 310, 316-318, 73 L. ed. 706, 710, 49 S. Ct. 300 (1929).



**A. The Admission in Evidence of a Consent Agreement Between the Gamble Ranch Company and the California Real Estate Commissioner Was Plain and Prejudicial Error and the Prosecutor's Use of the Consent Agreement Was Prejudicial Misconduct.**

In June and July of 1962 discussions between the Real Estate Commissioner's office and the Gamble Ranch Corporation concerning alleged misrepresentations by the Company brought about negotiations regarding a voluntary agreement by the Company to stop sales of land in California pending further investigation by the Real Estate Commissioner [R. T. 11,192-11,194; R. T. 12,605-12,609; R. T. 14,017-14,024]. The officers and attorneys for Gamble Ranch volunteered to stop all sales until solution of the problems raised by the Real Estate Commissioner [R. T. 12,609].

Three lawyers, Eugene Wyman, Marvin Finell and Bertram H. Ross testified that the corporation itself offered to cease sales pending further investigation by the Real Estate Commissioner until the problems raised by the investigation were resolved. The Real Estate Commissioner wanted a ". . . formal document legalizing a cease and desist requirement, and an informal agreement would be satisfactory to the department." [R. T. 12,609, lines 16-18]. Finell testified that Wyman, Finell and Ross told the Real Estate Commissioner,

" . . . we would consent to a formal decree if two things were clear: if Number One it was clear that there was no allegation or admission of fraud on the part of the corporation or any of the officers of the corporation, or for that matter, any salesmen . . ." [R. T. 12,609, lines 20-25].

Finell further testified that one of the representatives of the Real Estate Commissioner agreed to that condition [R. T. 12,610, lines 16-17] and it was further agreed that the Real Estate Commissioner would prepare and forward to the corporation a Consent Decree for execution by the officers of the Corporation [R. T. 12,610, lines 23-25]. The agreement was made for the Real Estate Commissioner by the man from the Commissioner's San Francisco office, who had acted as chairman of the meeting for the Real Estate Commissioner [R. T. 12,610, lines 13-24]. Finell and Wyman received a copy of the Consent Agreement [Ex. 1-1125] and together they examined it and concluded there was no admission of fraud in it.\* Accordingly Finell advised their clients there was no admission of fraud and they could sign the Consent Agreement; the clients did so on Finell's advice [R. T. 12,611-12,613]. The testimony of Ross and Wyman was to the same effect [R. T. 11,192-11,194; R. T. 14,017-14,027].

On July 16, 1962 corporation officers signed the document entitled "Order to Desist and Refrain; Stop Order; and Consent Agreement." [Ex. 1-1125; R. T. 6,276-6,277]. This document, hereinafter referred to as the "Consent Agreement" provides, in pertinent part [paragraph VI] that the Company and named individuals ". . . represent and agree that each and all of the legally required facts and circumstances for the issuance of [a Cease and Desist] Order by the Commissioner [pursuant to Business and Professions Code section 11,019] exists. . . ." The Consent Agreement was not an admission of fraud or wrongdoing and the

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\*See Appendix D for reproduction of Ex. 1-1125.

record shows the representatives of the California Real Estate Commissioner knew this, as shown below.

The grounds for issuance of a Cease and Desist Order are a finding by the Commissioner that the subdivider is violating certain provisions of the subdivision law or that “. . . further sale . . . of . . . parcels . . . would constitute grounds for denial of the issuance of a public report under the provisions of section 11,108 [of the Business and Professions Code] . . .” (See Business and Professions Code §11019).

Section 11,018 has eight sub-sections, (a) through (h) each constituting separate grounds for refusing issuance of a public report. Only sub-section (b) provides for refusal to issue a public report when:

“(b) The sale or lease would constitute misrepresentation to or deceit or fraud of the purchasers or lessees.”

It was not clear from the Consent Agreement which sub-section of Business and Professions Code section 11018 was relied upon as the jurisdictional basis of the Consent Agreement. Undoubtedly the Consent Agreement was so vaguely worded in order to conform to the agreement between the Commissioner and attorneys for defendants that execution of the Consent Agreement would not be an admission of fraud.

**(1) Receiving the Consent Agreement in Evidence as an Admission of Fraud by Defendants Constituted Plain and Prejudicial Error.**

Statements made during settlement negotiations and the settlements themselves are not admissible to show liability of the party offering to satisfy a claim unless the offer or statement is an unconditional admission of

liability (IV *Wigmore, Evidence*, section 1062 at pages 34 and 39 (McNaughton Rev. 1961)).

Here, the California Real Estate Commissioner had a "claim" against defendants which was settled by the Consent Agreement [Ex. 1-1125]. Now the prosecution in the present case has used *not statements made in negotiation, but the Consent Agreement itself* as evidence that defendants admitted liability for alleged misrepresentation. Such use of the Consent Agreement was improper, and prejudicial error.

In civil cases the authorities hold that settlement with one claimant is not competent evidence of an admission of liability in a lawsuit brought by another claimant. In *Price v. Atcheson, Topeka & Santa Fe Railroad*, 164 Cal. App. 2d 400 (1958), defendant had been subjected to separate lawsuits by A and B, who had both been injured in a derailment of defendant's train. Plaintiff B sought to place in evidence defendant's stipulation for judgment in favor of A in a different case. It was held that this settlement with A was not admissible against defendant in B's trial.

The Court reasoned that admitting evidence of a compromise settlement was harmful because it invaded the province of the jury on the ultimate question of liability, poisoned the minds of the jurors, amounted to using the defendant's own opinion on a matter in which he was not a competent expert, and was inimical to the policy favoring settlements. The Court stated, *inter alia*:

" . . . [It] should be the aim of the court to endeavor to derive a determination of factual liability by competent proof of the circumstances and occurrences constituting the transaction alleged,

and it should not be guided by compromise settlements which the defendant has made of other claims arising out of the same facts. . . .

\* \* \* \* \*

“‘It is contrary to public policy to subject a person who has compromised a claim to the hazard of having his settlement proved in a subsequent lawsuit by another person asserting a cause of action arising out of the same transaction. To receive such evidence would inevitably tend to discourage settlements out of court if one’s purchase of his peace with one person were to be thereafter taken as an admission of his liability for an occurrence which brought injury to another. Reasonable and compelling circumstances might very well influence the defendant to make settlement with the third person while denying all liability to the plaintiff. No party to a justiciable controversy should be discouraged from amicably adjusting his claim by the fear that he might subsequently be confronted with the contention that his concession there was an admission of liability. The rule protecting compromises is too salutary to be whittled away.’” (164 Cal. App. 2d at 404-407. *Accord: Brown v. Pacific Electric Railway Co.*, 79 Cal. App. 2d 13 (1947)).

Only a few decisions touch upon the problem of using *civil* settlements as evidence of *criminal* liability. In *Helms v. State*, 35 Ala. App. 187, 45 So. 2d 170 (1950) defendant, charged with assault with intent to murder, was cross-examined as to whether or not he had paid the victim \$1,500 in settlement of a civil action by



the victim against the appellant. It was held by the Appellate Court that such settlement of the civil case did not constitute admissible evidence of guilt in the criminal case. The Court reasoned:

“We have found no cases from this jurisdiction, or from any other for that matter, which consider the question of admissibility of evidence in the criminal prosecution of the settlement of a civil action growing out of the same incident.

“However, it is clearly settled by the doctrine of our cases that a judgment gained in a civil suit is not admissible against the defendant in a criminal prosecution growing out of the same transaction. *Britton v. State*, 77 Ala. 202. Conversely, verdicts in criminal cases are not admissible in civil cases arising out of the same transactions. *Carlisle v. Killebrew*, 89 Ala. 329, 6 So. 756, 6 L.R.A. 617.

“In 22 C.J.S., Criminal Law, section 50, the general rule, amply supported by authority, is stated as follows: ‘. . . it is generally held that a judgment or opinion in a civil action or the record of proceedings therein, is not admissible in a subsequent criminal prosecution involving the same matter.’ The reasons underlying the doctrine are that the parties are not the same; the penalties are not the same; the causes of action are different; the burden of proof is not the same; the rules of procedure are not the same, in that in a civil action the defendant may be forced to testify, where he cannot be compelled to do so in a criminal proceeding.”

The Court then reasoned that evidence of civil settlements was as inadmissible in a criminal case as evidence of civil judgments.

“It would rationally appear that if a *judgment* obtained in a civil proceeding is inadmissible, in a subsequent criminal prosecution, where at least a civil judgment was obtained after hearing under judicial supervision, then certainly a *settlement* in a civil cause, made without the protection of trial safeguards, and perhaps merely to get rid of the worry of a pending suit, cannot be said to have any probative value in determining the issues of the criminal prosecution. It further cannot be denied that evidence of the settlement of the civil suit, growing out of the same matters as does the criminal prosecution, would ordinarily tend to influence the mind of a juror in the criminal prosecution to the prejudice of the defendant. [Emphasis added]. Reversed and remanded.”

*Accord:*

*Strickland v. State*, 115 So. 2d 273, 276, 5 Div. 560 (Ala. 1959).

Only two Federal cases have been found which touch upon the point in question. *United States v. Konovsky*, 202 F. 2d 721, 726-727 (7th Cir. 1953) was a criminal prosecution for conspiracy to deprive persons of their civil rights. Shortly after the alleged offense occurred the Federal District Court issued an order for a temporary injunction to prevent defendants from repeating or continuing the same acts charged later in the criminal indictment. In the criminal case the Government introduced in evidence the civil injunction order and argued that defendants' compliance with the

injunction was an “admission” of facts showing guilt of the criminal charge. The jury was instructed that the civil injunction was not evidence of guilt and the Government argued that the civil judgment was merely “. . . a circumstance in the light of which the conduct of the defendants should be ‘evaluated’.” A judgment of conviction was reversed. The Court of Appeal held that admitting the civil judgment in evidence was plain and prejudicial error, stating:

“We see no escape from the conclusion that the inevitable effect of the introduction of the civil judgment in evidence was to lead the jury in the trial of this criminal case to believe that the same issues had already been determined in the civil action. In our opinion nothing could be more prejudicial to a fair trial. See *Hodges v. State*, Okl. Ct.App., 222 P.2d 386. . . .

“It is said that the defendants waived the objection in this respect. We do not understand that the mere fact that defendants attempted to meet the erroneous evidence constituted waiver upon their part. . . . Furthermore, even if defendants had waived the objection, we think it would be our duty under Rule 52(b) of the Rules of Criminal Procedure, 18 U.S.C., to notice the error ourselves.”

Federal courts should recognize that the policy expressed in *Konovsky* requires a holding in a case like the present one “. . . that if a *judgment* obtained in a civil proceeding is inadmissible in a subsequent criminal prosecution, where at least a civil judgment was obtained after a hearing under judicial supervision, then certainly a *settlement* in a civil cause, made without protection of trial safeguards, and merely to get

rid of the worry of [the civil matter], cannot be said to have any probative value in determining the issues of the criminal prosecution.” (*Helms v. State, supra.*)

The extreme prejudice from improperly admitting such evidence in a criminal case may actually deprive a defendant of due process by denying him a fair trial. It is an unresolved constitutional issue which may yet go to the United States Supreme Court, as shown by the recent case of *Hamilton v. California*, ..... U.S. ...., 19 L. Ed. 2d ....., 88 S. Ct. 243 (1967) where three Justices of the United States Supreme Court indicated there may be grave constitutional problems involved in the use of offers of compromise as admissions of criminal liability. The *Hamilton* case was a memorandum decision denying a petition for Writ of Certiorari. Petitioner sought review of the decision of the California Supreme Court in *People v. Hamilton*, 60 Cal. 2d 105 (1963). In *People v. Hamilton* the defendant, while under arrest for suspicion of murder, volunteered an offer to plead guilty if he were guaranteed he would not receive the death penalty. This offer of compromise was received in evidence as an admission of guilt. The California Supreme Court held it was error to use the offer of compromise as an admission of guilt; however, finding independent and over-whelming evidence of guilt the California Supreme Court invoked the “harmless error” rule of the California Constitution and affirmed the conviction (60 Cal. 2d at 112-114). In dissenting from the denial of Hamilton’s petition for certiorari, Justices Douglas, Fortas and Marshall, noting the rule applicable in civil cases, voted to grant certiorari to decide whether use of the compromise offer violated due process.



One of the reasons for not using a civil judgment or settlement as evidence on the ultimate question is that the issues are *not* the same. *Helms v. State, supra*. That is clearly true here. In the Real Estate Commissioner's administrative proceedings under the California Real Estate Subdivision Law it is not necessary to prove "specific and actual intent to defraud" as would be the case in a criminal proceeding for mail fraud. See *Phillips v. United States*, 356 F. 2d 297, 303 (9th Cir. 1965). The California Real Estate Commissioner has authority to issue a stop order to protect the public against the risk of purchasing poorly developed lots or parcels, whether or not the developer has made misrepresentations. See *Chapman v. Division of Real Estate*, 153 Cal. App. 2d 421, 430 (1957) where it was held the Real Estate Commissioner had power to stop sales of lots on grounds that the subdivision was characterized by poor and irresponsible planning. No necessity of showing any kind of fraud, civil or criminal, appears from the opinion. Therefore, it is irrelevant whether or not the evidence here justifies the conclusion that defendants agreed the Real Estate Commissioner had jurisdiction to issue a Stop Order. Even if they had so agreed that would not prove that defendants admitted they had committed criminal fraud since the Commissioner may issue a Stop Order on a showing of far less serious wrongdoing than necessary to convict for criminal fraud, or without showing wrongdoing at all.

The admission in evidence of the Consent Agreement was plain and prejudicial error.



(2) The Prosecutor's Offer and Use of the Consent Agreement as an Admission of Fraud Constituted Prejudicial Misconduct.

The Consent Agreement in the present case, Exhibit 1-1125, does not specify any grounds for a Stop Order other than the existence of facts required for an order under section 11,019, California Business and Professions Code. Defense witnesses testified, and they were not contradicted, that the agreement with the California Real Estate Commissioner provided that the Consent Agreement was not, and would not be treated as, an admission of fraud.

During the trial the prosecution called three witnesses from the office of the California Real Estate Commissioner, namely Henry Block, George Poppe and Lee V. Sida [See R. T. 7038, 7198, 14,147]. None of these three witnesses contradicted the defense testimony regarding the terms, conditions and circumstances of and surrounding the defendants' execution of the Consent Agreement. And no other witnesses were called by the prosecutor to contradict the defense testimony.

Nevertheless, the prosecuting attorney, in cross-examination and argument, attempted to establish that the execution of the Consent Agreement was an admission by the defendants that they had been guilty of fraud, misrepresentation and deceit in selling the ranch land. In the prosecutor's cross-examination of John Carey, the officer who signed for the corporation, the prosecutor implied and the witness denied that Carey knew or believed the Consent Agreement charged the corporation with fraudulent practices:

"Q. Were you aware, sir, when you signed that order . . . [and Consent Agreement] . . . that the

facts, conditions, and circumstances legally required for such an order involved fraud, misrepresentation and deceit?

A. No, I did not.” [R. T. 6454].

During cross-examination of Finell and Ross, attorneys for the Gamble Ranch Corporation, the prosecutor insinuated, and the witnesses denied, that fraudulent practices are the jurisdictional basis for the Commissioner’s making a Stop Order and that signing the Consent Agreement was an admission of fraud [See [R. T. 12,632-12,635; 11,474-11,480; 11,493]. Finell specifically testified on cross-examination that the Consent Agreement had included the wording stressed by the prosecutor only because the Real Estate Commissioner felt the inclusion of the statutory language was necessary for jurisdictional grounds so that the order would not be null and void [R. T. 12,632-12,635].

Despite such a record, in argument of the case the prosecutor told the jury again that the 1962 Consent Agreement was an admission of fraud on the part of the defendants [R. T. 14,780-14,781]. He also misinterpreted the evidence [Ex. 1-1125] by insisting Ross was wrong in stating that the Consent Agreement did not contain one word about fraud and misrepresentation [R. T. 14,381-14,382; Ex. 1-1125].

Under the circumstances, it was prejudicial misconduct for the prosecutor to use the Consent Agreement as an admission of fraud, and it was prejudicial er-

ror for the court to allow such use of the Consent Agreement, both because such evidence is inadmissible and because *undisputed testimony* shows the Consent Agreement was part of a negotiated settlement of a dispute between the California Real Estate Commissioner and the Gamble Ranch Corporation. Accordingly, the settlement negotiations, discussions, and terms of the settlement were inadmissible as admissions against appellant.

The prosecutor had a year between issuance of the indictment and commencement of the trial in which to prepare his case. He must have known the true facts. Early in the trial he offered to present the California Real Estate Commissioner to testify in support of the Government's position [R. T. 5835-5836]. But the Commissioner was never called. The prosecution had available to it several witnesses of the California Real Estate Commissioner. Although these witnesses testified on other matters the prosecution never sought by their testimony to refute defendants' contention that the Consent Agreement was signed only upon an understanding that there was no admission of fraud.

It is a familiar rule of trial and appellate practice that where testimony is uncontradicted and unimpeached, it may not be arbitrarily disregarded, but should be regarded as proof of the fact testified to, especially where contrary evidence, if it existed, would be readily available but was not offered. *Joseph v. Drew*, 36 Cal. 2d 575, 579 (1950). Since the evidence

was uncontradicted here that defendants signed the Consent Agreement only in compromise of a dispute which the Real Estate Commissioner of California, it is conclusive that the execution of the Consent Agreement may not be deemed an admission of fraud. Yet the prosecutor persisted in arguing to the jury that the defendants had admitted fraud.

The courts generally hold it is misconduct for the prosecutor to draw impermissible and illogical inferences from undisputed facts. (*King v. United States*, 372 F. 2d 383, 390 (D.C. Cir. 1967) (deliberate misinterpretation of medical evidence); *Smith v. United States*, 312 F. 2d 867, 869 (D.C. Cir. 1962) (prosecutor implied, contrary to fact, that medical report not admitted in evidence on question of the physical condition of complaining witness, because of defense objection, would have been damaging to defendant's case); *Dunn v. United States*, 307 F. 2d 883, 887 (5th Cir. 1962) (arguing evidence showed admission of guilt in absence of prerequisites for finding any admission at all); *Ginsburg v. United States*, 257 F. 2d 950, 953 (5th Cir. 1958) (in tax evasion case error to argue deposits in joint bank account with defendant's brother were unreported income where defendant denied making the deposits and there was no evidence to the contrary)).

This is a case where the prosecutor offered improper and damaging evidence, and then argued impermissible inferences to the jury after his theory of this inadmissible evidence was shown to be entirely without support. This is misconduct upon misconduct and requires reversal.

**B. After Claiming Surprise, the Prosecutor, on Re-Direct Examination of His Own Witness, Impeached Beyond the Point of Alleged Surprise by Informing the Jury the Witness Was a Co-Defendant Who Had Already Been Convicted in This Case.**

Arnold Clejan was named in the indictment. Before the jury was sworn he pleaded *nolo contendere* to twenty-two counts of the indictment and was sentenced accordingly\* [R. T. 415-435]. Clejan was called as a Government witness by the prosecutor. The Government did not on direct examination bring out the fact that Clejan had already been convicted of mail fraud herein. However, before redirect examination of Clejan, the prosecutor approached the bench, and informed the court that he wished to impeach Clejan by proof of prior inconsistent statements and specific contradiction in the evidence [R. T. 4555-4560]. The prosecutor gave no indication that he intended to bring out before the jury the fact that Clejan was a co-defendant who had been convicted of mail fraud in this very case.

The judge allowed the prosecutor to impeach as requested, on redirect. At the close of the prosecutor's redirect examination, the following took place without any warning to the court or defense counsel:

Mr. Nissen:

"Q. Mr. Clejan, just so we will know, you are the Arnold Clejan named in the indictment in this case, is that correct, sir?

A. Yes, sir.

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\*The sentence was \$800 fine and one year in jail on each count concurrently, with the jail time being suspended.



Q. And you have been convicted of a felony, sir?

Mr. Hunt: If the court please, I wish to approach the bench.

The Court: You don't have to. The objection is sustained.

Mr. Hunt: Your Honor please, I cite this as misconduct on the part of the Government and prejudicial error." [R. T. 4579].

Thereupon the court declared a recess, excused the jury, and conferred with counsel in the absence of the jury. Counsel for defendants pointed out that these questions were deliberately asked for the purpose of leading the jury to the inescapable conclusion that Clejan had been convicted of the same charges made against the remaining defendants and that very serious prejudice to the defendants resulted from the jury knowing that a co-defendant had been convicted of mail fraud charges in the same case. The conference with the court and counsel revealed that the prosecutor knew of no other conviction of Clejan and was referring to the felony conviction resulting from Clejan's indictment. The manner in which he asked the impeaching question—first establishing that the witness was "the Arnold Clejan named in the indictment"—shows that he anticipated an objection and that the objection would be sustained. All defendants joined in a motion for a mistrial [R. T. 4579-4583]. The court denied the motion for a mistrial but did rule that this was improper impeachment of the witness Clejan.

Thereafter the court instructed the jury as follows: "Ladies and Gentlemen, I will tell you again—I think that I told you before—you are to draw no

inference from questions that are asked by counsel, as questions by counsel are not evidence in and of themselves. You are to disregard this question that was pending at the time of recess, which Mr. Nissen asked Mr. Clejan, as to whether or not he had ever been convicted of a felony. You are to disregard that question entirely. There is no evidence on that point. You are to draw no inference at all from the question." [R. T. 4590].

Of course this instruction could not cure the harm done. It necessarily emphasized in the jury's mind the prosecutor's statement regarding Clejan's conviction.

Another incident later in the trial showed clearly that the conduct of the prosecutor in bringing out Clejan's conviction without warning to defendants was not accidental or unintentional misconduct. This occurred with reference to the witness Rockel, who had been an officer of the corporation and who had also been indicted and who, like Clejan, had been convicted before trial on a plea of *nolo contendere*. During the direct examination of appellant Reisman, appellant was asked by his attorney whether he had good faith belief in Rockel's honesty *at the time Rockel was hired* to work for the Gamble Ranch Company. Witness Reisman went beyond the question and volunteered the statement that he still believed in Rockel's honesty. Before cross-examination of Reisman could begin defense counsel obtained a conference before the bench in which the prosecutor was asked directly whether he intended to bring out on cross-examination of Reisman the fact of Rockel's plea of *nolo contendere* to the indictment for mail fraud in the same case. The prosecutor at first attempted to avoid answering the question but when he was forced to by the court he admitted that he intended to ask Reisman about Rockel's conviction in

this case to impeach Reisman's statement that he still believed in Rockel's honesty. Defense counsel objected. The judge took the matter under submission and eventually ruled that the prosecutor could not thus inform the jury of Rockel's conviction. [R. T. 13346-13352, 13675-13682, and R. T. 13788-13792].

In *United States v. Toner*, 173 F. 2d 140 (3rd Cir. 1940) the court stated:

" . . . [It] is the right of every defendant to stand or fall with the proof of the charge made against him, not against someone else. Acquittal of an alleged fellow conspirator is not evidence for a man being tried for conspiracy. So, likewise, conviction of an alleged fellow conspirator after a trial is not admissible as against one now being charged. The defendant has a right to have his guilt or innocence determined by the evidence presented against him, not by what has happened with regard to a criminal prosecution against someone else." (173 F. 2d at 142).

To the same effect are *Babb v. United States*, 218 F. 2d 538, 541-542 (5th Cir. 1955); *Fletcher v. United States*, 332 F. 2d 724 (D.C. Cir. 1964); *Kirby v. United States*, 174 U.S. 47, 43 L. Ed. 890 (1899); *Leroy v. Govt. of Canal Zone*, 81 F. 2d 914 (5th Cir. 1936); *United States v. Pannell*, 178 F. 2d 98 (3rd Cir. 1949); *United States v. Tomaiolo*, 249 F. 2d 683, 692 (2nd Cir. 1957); *United States v. Tucker*, 267 F. 2d 212 (3rd Cir. 1959); *Grunewald v. United States*, 353 U.S. 391, 420, 1 L. ed. 2d 931, 952 (1957).

The United States Supreme Court in *Grunewald* said that attacking the credibility of a non-party witness by cross-examination to bring out facts of his possible or admitted culpability as an accomplice is improper " . . .

because the probative value on the issue of [the witness'] credibility [is] so negligible as to be far outweighed by its possible impermissible impact on the jury.'” (*Grunewald v. United States*, 353 U.S. 391, 420, 1 L. ed. 2d 931, 952 (1957)).

In *Babb v. United States*, *supra*, a co-defendant who was a witness for the Government

“ . . . was permitted to testify over objection that he had plead guilty to all counts of the indictment. This was error. . . . Appellant not only objected to [co-defendant's] testimony as to his plea of guilty but requested the court to instruct the jury that they should not consider that fact for any purpose as bearing upon his guilt. We think this charge should have been given. A defendant is entitled to have the question of his guilt determined on the evidence against him, not on whether a Government witness or co-defendant has pleaded guilty to the same charge. Reversed.” (218 F. 2d at 541-542).

In *Fletcher v. United States*, 332 F. 2d 724 (D.C. Cir. 1964), an alleged accomplice, who was not a co-defendant in a robbery prosecution, was called as a witness. The alleged accomplice refused to answer questions possibly incriminating himself and the defendant in the robbery. It was held prejudicial error for the prosecution even to call the witness because no non-privileged testimony of the witness established any part of the Government's case, the testimony of the witness was the sole possible corroboration of the robbery victim's testimony against defendant, the Government knew the witness would take the Fifth amendment, and the jury would conclude that both witness and defendant were guilty.

In *Leroy v. Govt. of the Canal Zone*, 81 F. 2d 914 (5th Cir. 1936) the information charged three per-



sons with stealing currency. Two were tried first and convicted. In the later trial of the third person, it was held error to admit the record of conviction of the first two in the prior trial.

In the present case the prosecutor made sure the jury knew that the witness Clejan was a co-defendant named in the same indictment as the defendants and also made sure by his question that the jury knew that Clejan had been convicted. There was no excuse for the prosecutor doing this as impeachment of Clejan. The prosecutor had called Clejan as his own witness. Ordinarily, when the prosecution calls a convicted felon as a witness it is incumbent upon the prosecution to disclose the felony conviction by questions. The theory is that the prosecution vouches for its witnesses and therefore should disclose any facts which bear materially upon the credibility of such witnesses. This is to prevent unfair prejudice to the defendant. However, *where the witness is a co-defendant*, the inference of collective guilt is so overwhelming that prejudice to the defendant outweighs the probative value of such evidence on the issue of the witness' credibility and precludes the prosecution from revealing the co-defendant's conviction. (*Grunewald v. United States, supra*). Accordingly, in this case the prosecution, on direct examination, properly refrained from divulging to the jury that Clejan was a co-defendant who had been indicted together with the remaining defendants and did not disclose that Clejan had been convicted of a felony. To have done so would have been highly improper. These matters were not brought out by defense counsel on cross-examination for the obvious reason that to have done so would have prejudiced defendants. Nevertheless, on re-direct examination the prosecutor chose



a devious method for disclosing Clejan's conviction to the jury. Claiming the right to remove alleged surprise and damage the prosecutor sought the right to show contradictions and prior inconsistent statements on re-direct of Clejan. But the prosecutor did not indicate or disclose in any way that he intended to impeach Clejan by revealing his felony conviction in this case. As has already been pointed out, the prosecutor, an experienced trial lawyer, knew full well (1) that defendants would object to any proposal to impeach by showing the felony conviction, and (2) that the judge would undoubtedly sustain such an objection. This is so for the reasons stated above and also because the objectionable matter regarding Clejan's felony conviction could not properly be used to remove any of the surprise and damage claimed to have been caused by his testimony. The proper rule is stated in *Culwell v. United States*, 194 F. 2d 808 (5th Cir. 1952):

"It is the established rule that impeachment of one's own witness may be resorted to where his testimony has surprised the party offering him. However, the *impeaching matter is to be limited to the point of surprise* and even where there is a real surprise it is not proper to permit the impeachment testimony to go beyond the only purpose for which it is admissible, i.e., the removal of the damage the surprise has caused. . . ." (*Culwell v. United States*, 194 F. 2d at 811. Emphasis added).

The manner in which the prosecutor inserted Clejan's conviction into the trial shows that it was a deliberate, intentional "foul blow" struck by the prosecution with intent to prejudice the defendants. It de-

prived defendants of the right to have their guilt or innocence determined by the evidence presented against them not by what had happened with regard to a criminal prosecution against someone else. Here, the judge did sustain an objection to the improper impeachment but it was then too late; the damage had been done.

**C. After Calling Defendants' Advertising Man as a Government Witness, the Prosecutor Insinuated, Contrary to Fact, That the Witness Had Been Guilty of Mail Fraud in Advertising for Other Land Developments.**

John Roche was called as a witness for the prosecution. His occupation was advertising and for many years he had specialized in the advertising of real estate developments [R. T. 1145-1146]. Roche was called by the Government to testify regarding his preparation of advertising material used by the defendants in the Gamble Ranch land promotion [R. T. 1145 to R. T. 1360]. At no time during his direct or cross-examination was anything brought out tending to discredit Mr. Roche's personal reputation for honesty and credibility. Near the very close of the defendants' case Roche was called as a witness for the defendants to authenticate the original of defendants' Exhibit E-1 [R. T. 14236-14239]. It was necessary to call Mr. Roche only because of the court's questioning whether the defendants had established a sufficient foundation for Exhibit E-1 [See R. T. 14244]. On cross-examination, the following took place:

"Mr. Nissen:

Q. Sir, [addressing Roche] some of your advertising has previously been involved in mail fraud cases, has it not?

Mr. Hunt: If the court please, I am going to certainly cite that as misconduct. That certainly is not within the scope of cross-examination here at all.

The Court: No. The objection is well taken and the jury is instructed to disregard the question. As I have told you before several times, any questions of counsel are not evidence." [R. T. 14242].

Thereafter defendants asked for a conference out of the hearing of the jury and moved for a mistrial on grounds of the prosecutor's intentional and prejudicial misconduct [R. T. 14243-14244]. The Judge ruled again that the question was improper but denied a mistrial [R. T. 14242-14244]. The defendants pointed out that when they cross-examined Roche at the time he testified for the prosecution they had used his testimony to show that they had gone ". . . to a reputable advertising representative, Mr. Roche." [R. T. 14244-14245]. Defendants also pointed out that neither they nor the prosecution had impeached Roche before when the prosecution called him as a witness; that the Government had refused to stipulate that a copy of Roche's diary offered in evidence [as Deft. Ex. E-1] was authentic; that this compelled the defendants to call Roche to authenticate the copy; and that without warning to defendants and without asking the court for a ruling in advance the prosecution asked the question about Roche's advertising having been involved in mail fraud cases. [R. T. 14244-14245].

In answer to the defendants' position the prosecutor stated that he was justified in impeaching Roche because the defendants had asked him if Albert Allen

(attorney for co-defendant Arnold Clejan) had reviewed Roche's advertising. The prosecution was disputing that any of the advertising was reviewed or controlled by Clejan or his attorney Allen, so the prosecutor took the position that he was entitled to attack Roche's credibility when Roche testified to matters inconsistent with the prosecution's case [R. T. 14245-14246]. The prosecutor revealed that he had a particular case in mind when he asked the question of Roche: "Sir, some of your advertising has previously been involved in mail fraud cases, has it not?" [R. T. 14242]. The prosecutor stated, at R. T. 14246-14247:

"... the case I was questioning about was in the U.S. District Court in the Southern District of California. . . . and his advertising was subject of misleading advertising [sic] . . . [the question of Roche was asked] to [attack] Mr. Roche's credibility . . . that here the defendants are accused of misrepresenting advertising, and Mr. Roche who has had advertising which has been the subject of prosecution for misrepresentation, and then to cast down on his credibility when he comes in and tries to corroborate the defendants' story that Mr. Allen was passing on the ad."

The court stated that it was familiar with the case referred to by the prosecutor but that: "I don't think it was a proper question [to ask Roche] under the circumstances."

The case referred to by the prosecutor is undoubtedly *Harris v. United States*, 261 F. 2d 792 (9th Cir. 1958), another prosecution for alleged mail fraud in connection with the promotion of a real estate develop-

ment. Roche had been hired by the defendants in *Harris* to prepare advertising for their real estate development. However the *Harris* opinion reveals that Roche was not indicted and was not a defendant. See 261 F. 2d at 796.

The impeachment of Roche was by means of incompetent evidence (acts of purported misconduct not resulting in a felony conviction), by cross-examination beyond the scope of direct examination, and was further improper because it insinuated more than the prosecutor could honestly have proved even if such proof was competent; *i.e.*, it insinuated that the witness Roche was somehow culpable in previous mail fraud cases, when in fact he had been “involved” in only one case and even then, not as a defendant. That the impeachment was known by the prosecutor to be improper and incompetent is shown by the fact that the prosecution did not offer the impeaching evidence at the time he himself offered the witness in the prosecution’s case but waited until he could compel the defense to call him as a witness and then attempted to impeach him and claimed that the impeachment was “a matter of right.” This is intentional and deliberate misconduct on the part of the prosecutor.

The jury, knowing that Roche had done advertising for the defendants, could have believed from the testimony of Roche and other witnesses, that Roche was, and that defendants believed he was, a reputable advertising man. This was an important element in appellant’s defense of good faith, *i.e.*, that appellant in good faith tried to avoid any sharp or shady advertising practices by relying on a reputable advertising man. The prosecution effectively destroyed this impression



by use of the improper and prejudicial question: "Sir, [Mr. Roche] some of your advertising has previously been involved in mail fraud cases, has it not?" The question left the jury free to speculate as to how the Roche advertising had been "involved" in mail fraud cases. They could believe that the advertising itself was false, and that Roche had been a defendant or even been convicted. Since the United States Attorney ought to know when someone has serious involvement in a mail fraud case the jury would be unreasonable if it did *not* accept the prosecutor's innuendo as *fact*. But what the prosecutor referred to in this question was a case where he knew Roche had not been found guilty of mail fraud, had not been indicted, and had not even been a defendant. However, the jury could not be informed of the true facts without prejudicing defendants by emphasizing the objectionable material even more. The damage was done once the prosecutor asked his insinuating question.

The kind of prosecutor's tactic here objected to has been held to be misconduct in several cases. In effect the prosecutor, by the form of his question, stated and argued to the jury facts which were not only not in evidence but which could not have been placed in evidence. This is always error and misconduct on the part of the prosecutor. See *Smith v. United States*, 312 F. 2d 867 (D.C. Cir. 1962) (prosecutor's insinuation, contrary to fact, in argument that medical records properly excluded from evidence on defense counsel's objection, had been objected to because they were damaging to defendant). It is always error, and often prejudicial error, to insinuate that a defendant is linked with other alleged wrongdoing not a part of the charges against the defendant in the particular prosecution. See

*Watson v. United States*, 234 F. 2d 42, 45 (D.C. Cir. 1956) (on cross-examination of defendant in rape-murder case, prosecutor insinuated defendant was linked with another unsolved rape); *Wagner v. United States*, 263 F. 2d 877 (5th Cir. 1959) (in fraud case prejudicial error for prosecutor to insinuate in argument that defendant was guilty of other and more profitable frauds besides the one being prosecuted).

That the prosecutor's tactic here was prejudicial misconduct is shown by *Turner v. United States*, 35 F. 2d 25 (8th Cir. 1929), where defendant was charged with mailing allegedly obscene matter, a newspaper article. In *Turner*, the defense counsel asked a witness to compare the allegedly obscene article with an identical article published in another newspaper, the *San Diego Herald*. The following colloquy took place between prosecutor Statler, the court, and defense counsel Frumberg:

“Mr. Statler: If the Court please, to save time, we will admit that article was published in the San Diego Herald.

The Court: All right, the same article, in other words.

Mr. Statler: We are willing to make a further admission at this time—that is, that the editor and publisher of the San Diego Herald is under indictment for the publication of that same article in California.

Mr. Frumberg: I object to that, and ask the Court to grant a mistrial in this case.”

On appeal, Turner's conviction was reversed because of this act of the prosecutor. (35 F. 2d at 27.)

*Turner* is precisely in point here. In *Turner*, when the evidence disclosed that the allegedly obscene article had also been published in the San Diego newspaper, the prosecutor informed the jury that the San Diego editor was under indictment for publishing the article. In the present case, where the propriety of Roche's advertising was in issue, the prosecutor deliberately informed the jury that "... some of [Roche's] ... advertising [had] previously been involved in mail fraud cases." The *Turner* Court's reversal of the conviction is based on reasoning equally applicable here:

"There is no doubt that the remark of the prosecuting attorney was highly prejudicial. It was so regarded by the court, and the jury was cautioned to disregard it. Notwithstanding the caution, the statement had the effect of getting before the jury inadmissible evidence of an irrelevant fact; namely the indictment of the editor of the San Diego paper. The statement of counsel was not inadvertent, was not made in the heat of argument, but it was deliberate; and in our opinion it was intended by counsel in making the statement to influence the jury improperly. In all human probability it did influence the jury. . . . Because of the improper prejudicial remarks of counsel above considered, we have reached the conclusion that the judgment should be reversed." (35 F. 2d at 27).

Here, as in *Turner*, the inadmissible evidence of an irrelevant fact is the purported but unproved wrongdoing involving events not material in the trial. Likewise, the question by the prosecutor here was not inadvertent, but was deliberate misconduct intended to prejudice the jury. As in *Turner*, the misconduct here requires reversal.

**D. In Cross-Examining Appellant Reisman the Prosecutor Made Baseless Insinuations That Appellant Had Tampered With Evidence and Perjured Himself.**

During the cross-examination of appellant, the prosecutor did everything he could to charge appellant with various kinds of dishonest conduct. The prosecutor had absolutely no basis for doing so. His attempts to discredit appellant without basis and on collateral, immaterial matters conforms to a pattern established early in the case by the prosecution. A few examples follow.

**Accusing Appellant of  
Tampering With Evidence.**

At one point in his cross-examination of appellant, the prosecutor placed before appellant Exhibit 2-131, a Gamble Ranch file that had been in the Government's custody since the grand jury hearing. In the file were documents marked A, B, and D. Apparently there was no document marked C in the file. The prosecutor thereupon sought to create the inference that appellant had stolen or removed the document. He said:

“The file thereafter skips from -B to -D. Have you ever seen the -C page?” [R. T. 13,712-13].

Counsel for appellant then pointed out that the file was marked by the Government and appellant remarked that page C had apparently been omitted in the marking process [R. T. 13,713]. But the prosecutor was not satisfied. So that there would be no doubt that he was accusing appellant of tampering with the file, the prosecutor said:

“Q. Will you tell us, sir, under oath you have not seen a page of the copy marked -C in your life?” [R. T. 13,714].



Appellant's answer to this unfounded accusation was that he had no idea whether there was ever a paper marked C in the file [R. T. 13,714]. The prosecutor had no idea either. After counsel for appellant cited the prosecutor for misconduct [R. T. 13,720], the prosecutor sought to explain his motives outside the presence of the jury. His explanation falls hopelessly short of establishing a basis for the charge against appellant. He told the court, "with some reluctance," that on one occasion a document labeled A was missing from a file marked Exhibit 2-853, and on another occasion the document was allegedly "back in the file." [R. T. 13,792-93]. What this alleged incident involving one file had to do with charging appellant with removing a paper from another file is anyone's guess. But any question of a connection between the two incidents was resolved when the prosecutor admitted *he did not even know who removed the paper from Exhibit 2-853.*

"I am not going to say who did it. *I don't know.* . . ." [R. T. 13,793]. (Emphasis added).

In other words, the prosecutor had no evidence that anyone had tampered with either file and certainly no evidence that any specific person had tampered with files. But he accused appellant of doing so. This unconscionable conduct itself compels reversal.

#### **Accusing Appellant of Perjury.**

Reisman testified that Mr. Bircher of the California Real Estate Commissioner's office had discussed with Mr. Reisman the advertising of the Gamble Ranch Company and had told Mr. Reisman he (Bircher) was



satisfied with the advertising after conducting his review. The prosecutor asked Reisman:

“You know, of course, that Mr. Bircher is dead and can’t contradict you, don’t you?”

Upon objection by defense counsel the jury was instructed to disregard the remark [R. T. 13396]. The question was asked for only one purpose: to create the impression that appellant testified falsely to what Bircher had said because he knew Bircher couldn’t contradict the testimony. This amounts to an accusation that appellant perjured himself. As with other accusations made by the prosecutor, there was absolutely no evidence to support this one.

**Intentionally Bringing  
Incompetent Evidence  
Before the Jury.**

On several occasions questions of the prosecutor to Mr. Reisman were actually hearsay testimony by the prosecutor himself and argument in rebuttal to Mr. Reisman’s testimony. For example, the prosecutor showed defendant Reisman a Los Angeles Herald Express newspaper article and photograph depicting the Gamble Ranch property favorably, and asked appellant if he had protested the photograph and article as being a misrepresentation of facts. Reisman answered that he did not previously know of the existence of the article and did not know where the newspaper had obtained the photograph. The prosecutor then stated:

“The picture . . . comes from Mr. Roche’s photographs . . . it is a picture of Mr. Roche’s black and white pictures that appear in the sales kit. . . .”  
[R. T. 13598-13599].

The same sort of exchange between prosecutor and witness occurred immediately thereafter with respect to another newspaper article [R. T. 13599]. This procedure was objected to by defense counsel as constituting gratuitous hearsay testimony by the prosecutor regarding matters not in the record, or if the matters were in the record then constituting argument of the case to the jury in the guise of testimony [R. T. 13598, 13600, 13602-13603]. Without sustaining the objection the court said, "The jury will determine it." [R. T. 13,599]. Such incompetent matter should not have been presented to the jury at all. Appellant was convicted on the basis of hearsay newspaper articles for which he was in no way responsible and of which he had no knowledge.

The kind of cross-examination to which appellant Reisman was subjected by the prosecutor is strongly disapproved by the courts. It is error to attack a witness' credibility by cross-examination as to specific instances of purported discreditable conduct which did not result in a felony conviction. (*Abdul v. United States*, 254 F. 2d 292 (9th Cir. 1958) (in prosecution for alleged failure to fix tax return prosecutor's misconduct consisted in cross-examining defendant regarding alleged misleading advertising and sharp business practices). Accord: *Thurman v. United States*, 316 F. 2d 205 (9th Cir. 1963); *Ross v. United States*, 180 F. 2d 160 (6th Cir. 1950).) In *Block v. United States*, 221 F. 2d 786, 790 (9th Cir. 1955) (conviction reversed on other grounds) the court expressly disapproved such tactics stating:

"The practice of attempting to convict a defendant not of the crime of which he is charged, but

rather of being an all-round no good dissolute person, is foreign to our system and is disapproved by this Court.”

The examples of misconduct by the prosecutor presented here are only a few of the many that took place during the trial. Such unfair tactics should not be sanctioned. They were grossly prejudicial to appellant and should result in reversal.

**E. The Prosecutor Insinuated Without Basis in the Record That Appellant, His Counsel or Counsel's Investigator Tampered With Evidence.**

As part of the prosecution's case-in-chief the prosecutor called numerous purchasers to testify to alleged misrepresentations as to the quality and value of the Gamble Ranch property. To rebut this, the defendants called several purchasers who testified (1) that the land they purchased and inspected was as it had been represented, and (2) that they were not misled as to the character of the property by representations which the prosecution had attempted to prove were actually misrepresentations. These purchasers were persons who had continued to make their payments on the land and were not dissatisfied with their purchase. In preparing this part of the case defendants obtained from the court a subpoena for Gamble Ranch files in possession of Holly Corporation, a subsidiary of the Mt. Vernon Company, successor in interest to the Gamble Ranch Development Company. The subpoena was placed in the hands of a process server, Roger Feinbloom, who served the subpoena on the Holly Corporation. Instead of appearing in court with the records

itself, the Holly Corporation's representative handed them to the process server on the process server's representation that he would take the files to court immediately himself. The process server testified that he did take the files to court immediately and delivered them to counsel for appellant Reisman [R. T. 9600-9603. 9656-9662].

During testimony of one of the first purchaser witnesses for the defense, Mr. Sekiguchi, the prosecutor, on voir dire examination implied that there had been tampering with the files [R. T. 9397, lines 15-18; R. T. 9399, lines 18-21; and R. T. 9399, line 24, to 9400, line 1]. The impression left in court was that "... he [the prosecutor] doesn't believe [defendants] are submitting authentic evidence." [R. T. 9400, lines 15-19]. The prosecutor did not deny that it was his intention to leave such an impression.

The defense fully authenticated the documents as being genuine files of the Gamble Ranch Corporation. Mr. James Floyd Ragen of the Holly Corporation, was called as a witness and testified that the Holly Corporation had received these files from the Gamble Ranch Company; testified to the continued possession and custody of the files by the Mt. Vernon (Holly) Companies during their operation of the Gamble Ranch after taking it over from the Gamble Ranch Development Company [R. T. 9603-9624]; that Holly had released some of the Gamble Ranch files to the United States Postal Inspectors pursuant to order of the grand jury, had released some of the files to Mr. Landsman, a witness for defendant Benaron, and had released some of the files to the process server, employed by counsel for defendant Reisman [R. T. 9600-9603].

During cross-examination of Mr. Ragen the prosecutor asserted that the United States Grand Jury had ordered the Holly Company to retain custody of the Gamble Ranch purchaser files and not to release them without first consulting the United States Postal Inspectors or the United States Attorney [R. T. 9634.]. The plain implication of this assertion was that appellant's counsel obtained the files from the Holly Company in violation of the law by disobedience of some grand jury order. First, other than the prosecutor's bare assertion, there was no evidence that the Grand Jury ever made any such order. Secondly, this implication of wrongdoing, sure as it was to prejudice the jury, was just as surely known by the prosecutor to be unwarranted, erroneous and improper even if the grand jury had made such an order. Such an order by the grand jury would be void and of no force and effect. The Holly Company had an absolute legal right to consent to inspection of their documents by defense counsel because the law did not give the grand jury any right to impound documents brought to the grand jury proceedings and not marked as evidence. The Grand Jury itself has no power to issue or enforce a *subpoena ducas tecum*. These are issued only by the District Court in aid of a grand jury investigation; and the District Court may refuse process to the grand jury, or impose limits upon the scope and time limits of such process. (See Rule 17(c), Federal Rules of Criminal Procedure; *United States v. Smyth*, 107 F. Supp. 283, 293 (N.D. Cal. 1952); *In re National Window Glass Workers*, 287 Fed. 219, 225 (N.D. Ohio 1922); *United States v. Medical Society of D.C.*, 26 F. Supp. 55, 56-57 (D.D.C. 1938); *In re Eastman*



*Kodak*, 7 F.R.D. 760, 762 (W.D.N.Y. 1947); *Hale v. Henkel*, 201 U.S. 43, 76-77, 50 L. ed. 652, 666 (1906).)

Furthermore,

“ . . . Documents, records or papers produced in obedience to a subpoena duces tecum remain the property exclusively of the person who produces them and they must be returned to him as soon as proper use and examination of them for the purpose for which they were summoned has been completed. [Citations]

“In fact, obedience to a subpoena duces tecum would be complete if the papers called for were presented to the Grand Jury at its session and taken away again at the end of the particular session. See *In re American Sugar Refining Company*, C.C.N.Y. 1910, 178 F. 109. It is thus apparent that a party under subpoena duces tecum is entitled to the return of all its papers as soon as the Grand Jury [is] dismissed without having returned an indictment . . . Neither the Grand Jury nor the Department of Justice has the authority to impound papers which it is deemed in the public interest to preserve. Matter of *Atlas Lathing Corp. v. Bennett*, 176 Misc. 959, 29 N.Y.S. 2d 458. That such power exists only in the court is clear.” (*Application of Bendix Aviation Corporation*, 58 F. Supp. 953, 954 (S.D.N.Y. (1945))).

The prosecutor also must have known that

“Documents produced pursuant to a grand jury subpoena remain the property of the person producing them, see *Application of Bendix Aviation Corp.*, D.C.S.D.N.Y. 1945, 58 F. Supp. 953; Mat-

ter of Randall, 1903, 84 App. Div. 245, 84 N.Y.S. 294, and their inspection by persons other than the grand jury and the prosecuting attorneys is therefore dependent upon the consent of the owner or upon a court order.” (*United States v. Interstate Dress Carriers, Inc.*, 280 F. 2d 52, 54 (2nd Cir. 1960) ).

Accordingly it was improper, and misconduct, for the prosecutor to imply that the Holly Corporation was forbidden to disclose the Gamble Ranch files to appellant’s counsel, since there were no valid or legal reasons precluding inspection by anyone, with the consent of Holly.

Moreover, the prosecutor implied in his cross-examination that he believed that there may have been tampering with the files because they had been released to the appellant’s process server and investigator for transportation to court instead of being brought directly to court by an official of the Holly Corporation [R. T. 9637]. Mr. Hunt, counsel for appellant Reisman, made a statement in open court explaining how the file came from the Holly Company to court [R. T. 9637-9638]. Immediately thereafter the prosecutor insinuated there had been tampering with the files and that a letter from a certain purchaser had been removed from one of the files obtained by defendants from the Holly Company [R. T. 9638-9639].

The prosecutor followed this up by impeaching the witness Ragen through a showing that he had suffered a felony conviction in 1959 [R. T. 9646-9647]. The prosecutor had previously called the same witness, Mr. Ragen, in the Government’s case, and at that time had not impeached Mr. Ragen [See R. T. 2526-2537].

Although it was the right of the Government, on cross-examination, to impeach a defense witness by showing a felony conviction, the situation is different where the Government has previously called the same witness and not brought up the matter of the felony conviction and subsequently raises the matter to add weight to the Government's insinuation and implication that somehow there was wrongdoing and tampering with the files, either by the witness-custodian or by the defense.

All this was extremely prejudicial. It was misconduct because the Government offered no proof for any of the implications and insinuations regarding tampering. The defendants completely authenticated the files by showing the chain of custody from the time the files left possession of the Gamble Ranch Development Company until the time they appeared in court. There was no showing at all by the prosecution that any document had been removed from the files or that there had been any tampering with the files [See R. T. 9600-9603, 9656-9661]. There was no such showing because the files had not been tampered with.

The tactics employed by the prosecuting attorney were clearly designed to implant in the mind of the jury the idea that defense counsel were guilty of bad faith and tampering with the evidence. It is prejudicial misconduct to attack the integrity of the opposing counsel without warrant since the implication that defense counsel is lacking integrity necessarily reflects unfavorably on defendant's case and prejudices the defense in the eyes and mind of the jury. See *New York Central Railroad Co. v. Johnson*, 279 U.S. 310, 73 L. ed. 706, 49 S. Ct. 300 (1929) (judgment for

plaintiff in personal injury case reversed because of misconduct of plaintiff's counsel in arousing passion and prejudice of jury against defendant by insinuating defense counsel was unscrupulous in its defense and lacking in integrity).

**F. The Prosecutor Used Inadmissible and Incompetent Charges and Statements in Complaint Letters in an Attempt to Incite the Passion and Prejudice of the Jury Against Appellant and to Arouse Sympathy for Purported "Victims" of Appellant's Alleged Wrongdoing.**

In an effort to prove that the appellant had knowledge of alleged misrepresentations to purchasers, the prosecutor offered in evidence hundreds of complaint letters sent to the company. The letters were improperly received and the jury was improperly instructed concerning the complaints under the decision of this Court in *Phillips v. United States*, 356 F. 2d 297 (9th Cir. 1965).<sup>\*</sup> However, even if the court had complied with the principles of the *Phillips* case, large portions of the complaint letters should not have been admitted in evidence or should have been excised. Anything in these letters that did not tend to apprise the defendants of alleged misrepresentation was irrelevant and prejudicial and should not have been placed before the jury. But such irrelevant matter was paraded before the jury—and in an artful manner. The prosecutor carefully selected complaint letters to produce the effect he desired [R. T. 6333, R. T. 6338, R. T. 6370-6371]. The effect desired was not only to show the complaints but also to present to the jury

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<sup>\*</sup>This point is discussed in full in Argument I, *supra*.



irrelevant matter tending to arouse the jury's sympathy for the purchasers as "victims" who had, for example, "... bought this ranch so we could live there when we retired in two years." [R. T. 6357]. Thus the error in admitting such statements was aggravated by the prosecutor's use of them.

The prosecutor was warned by the court not to introduce such matters into the record [R. T. 6362-6363, R. T. 6367-6368], but he deliberately disregarded the court's instruction [R. T. 6363]. For example, he read from one letter the disgruntled purchaser's accusation that the defendants were "... all ... a bunch of schemers and unfaithful to words and promises" and guilty of defrauding "... two old persons, like myself and my wife, who last year lost our only son ...". The court twice interrupted the prosecutor during the reading of that particular letter and warned the prosecutor, "These portions are not material, Mr. Nissen." and "I will have to interrupt you, Mr. Nissen." [R. T. 6362-6363].

That defense counsel deliberately refrained from aggravating this prejudicial matter by not objecting is shown by a conference at the bench shortly afterwards. Counsel for defendant Benaron, Mr. Rothman stated,

"... I want the court to know that I don't view as an advocate in this case Mr. Nissen's remarks on that last file ... as inadvertent, when he read that the son died and that the defendants are a bunch of schemers. If your Honor please, this has happened time and time again. I think if I were to sit here and count the times I might have five or six instances of this kind of thing, which the cases have expressly held to be improper." [R. T. 6366-6368].



Defense counsel further stated they believed there was nothing the court could do to erase this prejudicial matter from the minds of the jury, and did not accept the court's offer to admonish the jury to disregard the irrelevant matter. The prosecutor protested his innocence by implying that he stumbled upon this prejudicial matter inadvertently [R. T. 6366-6368].

The record indicates that the prosecutor had carefully chosen the material he wanted to read before he read it. There was a great deal of colloquy and protests by counsel over his reading such letters into the record at all [R. T. 6333-6338]. In defending his contention that he had a right to read the letters to the jury the prosecutor stated he had made a careful selection and knew exactly what he wanted to read and that it was pertinent. He said, for instance, "I would like to read from selected files of complaint letters from purchasers." [R. T. 6333]. "And I made up a list of the ones I wanted to read from." [R. T. 6338]. It is further evident that the prosecutor had very carefully culled from a mass of documents the letters he found most favorable to the prosecution and prejudicial to appellant [R. T. 6370-6371].

It is misconduct for a prosecuting attorney to arouse the jury's sympathy in a mail fraud prosecution by depicting the defendant as a bloated predator taking advantage of innocent and defenseless people. In *Beck v. United States*, 33 F. 2d 107, 113 (8th Cir. 1929) a mail fraud conviction was reversed because of misconduct of the prosecuting attorney in presenting evidence that the defendant company had draperies and leather chairs in its offices, that some of its personnel went to the horseraces at company expense, and in argu-

ing to the jury that defendant had “sat back in his leather chair” and “robbed” a woman; and that defendant has used company money to buy a car for his personal use, etc. Such conduct was also disapproved in *New York Central Railroad Co. v. Johnson*, 279 U.S. 310, 73 L. ed. 706, 49 S. Ct. 300 (1929), a personal injury case where the jury verdict for plaintiff was reversed because, among other things, plaintiff’s counsel prejudiced the jury by argument that depicted plaintiff as a decent girl who had suffered mental anguish because of her injuries and that further impugned the good faith of defense counsel as “. . . coming into this town . . .” and raising a defense that villified plaintiff by pointing out evidence that reasonably raised the possibility her symptoms were due to venereal disease.

In *United States v. Grayson*, 166 F. 2d 863 (2nd Cir. 1948) a mail fraud conviction, reversed on other grounds, the court expressed its disapproval of the prosecutor’s conduct in asking one of defendant’s customers whether he had a son in the [military] service, in asking another customer whether what she paid was all she had in the world, and in asking a third customer whether she was married, and in eliciting the answer that she had a husband in the service.

Under the circumstances of the present case the prosecutor’s conduct in eliciting the prejudicial matter must be deemed intentional and the error must be deemed serious misconduct.

As was stated in *Beck v. United States*, 33 F. 2d 107 (8th Cir. 1929) quoting from the United States Supreme Court opinion in *New York Central Railroad Co. v. Johnson*, *supra*:

“The public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict, uninfluenced by the appeals of counsel to passion or prejudice . . . where such paramount considerations are involved, the failure of counsel to particularize an exception will not preclude this court from correcting the error.” (33 F. 2d at 114).

The selective reading by the prosecutor of incompetent, irrelevant material from the complaint letters was designed to assure that the jury would decide the case on the basis of passion and prejudice. The attempt undoubtedly had the desired effect. This was misconduct and prejudicial. The judgment of conviction should be reversed.

**G. The Prosecutor Attempted to Use Incompetent Matter to Arouse in the Jury a Belief That All Out-of-State Land Subdivisions Are Fraudulent to Prejudice the Jury Against Appellant.**

Mr. Trescartes was called by the Government as an expert on land value and the Government offered his testimony to prove that the land was worth far less than it was being sold for by defendants [R. T. 6706-6735]. Cross-examination of Mr. Trescartes by defendants established that there had been sales of other subdivision lands in the immediate vicinity of the Gamble Ranch at prices in excess of the price at which the

Gamble Ranch land was offered [R. T. 6737-6757]. In redirect examination the following took place with reference to sales of other subdivision land for prices comparable to the Gamble Ranch offering price:

“Mr. Nissen:

Q. “In your opinion [Mr. Trescartes] would a *well-informed* buyer that knew all the facts about the property pay \$200, \$300 an acre for the Gamble Ranch?” [R. T. 6761-6762]. (Emphasis supplied).

An objection to this question was sustained on the ground it was argumentative. Again the prosecutor asked:

“Would a buyer, in your opinion, who offered to pay \$300 an acre for Gamble Ranch be well informed?” [R. T. 6762].

Another objection was sustained to this question. The prosecutor then continued:

“Mr. Nissen:

Q. With regard to these other subdivisions in the State of Nevada, so-called, Sir, are you aware how the land is being sold to people?

Mr. Trescartes:

A. Well, to a certain extent it is being sold through advertisements.

. . .

Mr. Nissen:

Q. And to your knowledge, Sir, have any of those subdivisions resulted in mail fraud prosecutions?

Mr. Trescartes:

A. I don't know.” [R. T. 6762-6763].

Here the prosecutor was clearly implying and insinuating by the form of his questions that any subdivision land sales at prices comparable to Gamble Ranch and sold through advertising must necessarily involve mail fraud and therefore, by implication, that Gamble Ranch lands involved mail fraud.

This was misconduct. To ask the question *without* knowing that there was a basis for an affirmative answer by the witness would be a deliberate and unwarranted implication that there was mail fraud involved in such other sales. But even if the prosecutor thought the witness would answer affirmatively, such a question would be deliberate injection of prejudicial and inadmissible matter. Proof of mail fraud charges without conviction is not admissible evidence that *the persons charged* have been guilty of misrepresentation and fraud. Such proof certainly cannot be used to raise even an inference that *appellant* was guilty. However, before the prosecutor could ever ask such a question in good faith he should have a sound basis for believing: that there were mail fraud prosecutions; that such prosecutions had resulted in convictions; and that the witness was aware of these facts and took them into consideration in determining value. Here the witness actually denied knowledge of any other mail fraud prosecutions. This was obviously an attempt by the prosecutor to inject, improperly, an intimation that people subdividing land and advertising through magazines and newspapers were being prosecuted for mail fraud and therefore anyone who engaged in subdivision and sale by advertising must necessarily be guilty of fraud. It is hard to over-estimate the effect that such a question by the United States Attorney may



have on a jury. The United States Attorney is a representative of the United States Government. He has the responsibility of prosecuting mail fraud cases. The jury would not regard his question as being asked in vain. Relying on the integrity and dignity of the United States Attorney's office the jury must be impelled to conclude that there have been other mail fraud prosecutions for land subdivisions similar to those engaged in by the defendants in this case. Of course, the effect on the jury is to inculcate in them a generalized belief that desert land subdivisions are suspect as a matter of course.

Later in the trial the prosecutor found another opportunity to reinforce this belief. In cross-examination of defendant Reisman the prosecutor offered into evidence a letter and attached newspaper clipping from Mr. Rockel, an officer of the company, to Mr. Reisman. The subject matter of the letter was a newspaper article regarding alleged fraudulent out-of-state land subdivisions. Over repeated objections the letter and newspaper clipping were permitted in evidence [R. T. 13800-13809; Exs. 1-1025; 3-4082]. The prosecutor offered it to show that the article was brought to Mr. Reisman's attention although it is entirely unclear how this is material. The following quotation from the transcript demonstrates the prejudicial nature of the proceedings with respect to the offer and reception in evidence of the letter and newspaper article:

“Mr. Nissen: I think, your Honor, that the Government's offer should reflect that we were offering the letter as a letter sent from Mr. Rockel to Mr. Reisman. The newspaper copy attached is offered to show here is [sic] an article involving

out-of-state land development brought to Mr. Reisman's attention. *We do not say, of course, that the newspaper article is offered to prove anything, of course, but it is information brought to Mr. Reisman's attention* (Emphasis added).

The Court: It is ordered in evidence, on that basis. Ladies and gentlemen, the newspaper article is not offered or received for the proof of the facts therein, but it is offered to show that this newspaper article came to the attention of Mr. Reisman. You may proceed.

Mr. Nissen:

Q. Mr. Reisman, the letter of November 13th and the attached news article, and in particular I noticed the newspaper clipping or article says, 'Rancho dreams may prove to be mirage . . . out-of-state land development schemes to be discussed in committee meeting.'

"Now, there comes a quote at the front of the article which says: 'Retire on your own rancho. Be the monarch of 20 acres in the lush green pastures of Arizona.' (Or Texas, or British Somaliland). 'These invitations are extended daily to Californians, many of them close to retirement age. Acreage is offered on no down payment with easy monthly terms. Everyone sympathizes with the city dweller who has spend [sic] his working lifetime pounding the pavements and dreams of retiring to a "a little place in the country." The State Division of Real Estate sympathizes with him, too; but it would like to make sure that the reality comes somewhere close to the dream.' "

“Then it mentions a period of time when so many lots were sold and so many parcels, etc., and some figures.

“The locations included Oregon, Nevada, Arizona and Utah, as well as Hawaii, Alaska, Brazil, and other South American countries.

“Land acquired by promoters at \$5 to \$10 an acre is being offered to investors here at prices from \$100 an acre upward.

The Court: Mr. Nissen, haven't we gone into this before?

Mr. Nissen: It is to show, Sir, that this was brought to Mr. Reisman's attention.

The Court: *For what purpose, to what end?* (Emphasis added).

Mr. Nissen: I have almost got to the portion that I am going to stop reading from, Sir.

The Court: Allright.

Mr. Nissen:

Q. And the next two paragraphs in particular:

“Much of this acreage never has been adequately surveyed, has no roads leading to it, has no water and is overgrown with sagebrush and desert vegetation.

‘Gerald J. McBride, Executive Secretary of the Nevada Real Estate Commission, said in the October issue of the Nevada Real Estate News, about some real estate promoters:—’

And it quotes him as saying what they do.

Upon reading this article, sir, *did you in any way believe that it was describing or referring to Gamble Ranch*, particularly the reference to Mr. McBride and what he has said?

Mr. Hunt: I think, your Honor please, *it would be immaterial as to what he thought upon reading this*. From what has been read this far, it is clearly a newspaper article about 'out-of-state land development schemes to be discussed in committee meetings' by a committee of the California State Legislature, and which occurred some time ago.

It is a collateral matter. The committee has made its report, its recommendations a long time ago, and if we are going into that collateral matter, we will go far afield.

I move that it all be stricken as immaterial.

The Court: The motion is denied." [R. T. 13,805-13,809]. (Emphasis added).

The quoted newspaper article contains serious charges: that out-of-state land developments in general are schemes to bilk hard-working "little people" into investing in desert land for retirement purposes when the land is entirely unsuitable, is purchased by the promoters for a pittance and resold to the "little people" at outrageous prices by means of bald-faced misrepresentations and fraud. The article borrows dignity by quoting "high-placed" public officials and its weight was further emphasized when the United States Attorney offered it in evidence and read it into the record.

The court, having revealed it had no conscious understanding itself of any reason why the matter was anything other than inadmissible immaterial hearsay, nevertheless allowed the prosecutor to continue reading the matter into the record.

But having tired of innuendo and implication, the prosecutor went further.

“Mr. Nissen:

Q. In other words, Sir, [addressing appellant Reisman] with regard to this paragraph—

‘Much of this acreage never has been adequately surveyed, has no roads leading to it, has no water and is overgrown with sagebrush and desert vegetation were you aware that was a fairly accurate description of the Gamble Ranch at that time?’

Mr. Reisman:

A. Absolutely not. It was not an accurate description of the Gamble Ranch at that time. So far as I am concerned, this particular article did not apply to the Gamble Ranch at any time.

Mr. Nissen:

Q. In the statement that *‘these con men . . . are using people’s dreams of security and private ownership of land to fleece them of their savings and ruin their chances of providing for the future.’*

I ask you, did you regard that the company you were involved with, Gamble Ranch, was using people’s dreams of retirement and security to get them to pay money for property that was like this, covered with sagebrush and so forth.” [R. T. 13809-13810]. (Emphasis added).

Thus, the prosecutor, after having told the court that, “We do not say, of course, that the newspaper article is offered to prove anything, of course. . . .” [R. T. 13,806], made it plain by his questions that he had offered the article *for the truth of its contents*. After reading from the article about “con men,” and



“fleecing” people of their savings, and “using people’s dreams of security” for profit, he asked if appellant thought “*Gamble Ranch* was using people’s dreams of retirement and security to get them to pay money for property that was like this, covered with sagebrush and so forth.” [R. T. 13,809-10] (Emphasis added). Although the article in no way referred to Gamble Ranch, and after his protestation that the article was not offered “to prove anything,” the prosecutor asked appellant, “Were you aware that was a fairly accurate *description of the Gamble Ranch* at that time?” [R. T. 13,806, 13,809-10]. (Emphasis added).

In *Turner v. United States*, 35 F. 2d 25 (8th Cir. 1929) (discussed in argument III, C, *supra*), the court reversed a conviction for mailing obscene matter because of the prosecutor’s misconduct in stating that the publisher of a newspaper article not the subject of the prosecution was under indictment. The language of the court is particularly pertinent to the conduct of the prosecutor in this case:

“The statement of counsel was not inadvertent, was not made in the heat of argument, but it was deliberate; and in our opinion it was intended by counsel in making the statement to influence the jury improperly. In all human probability it did influence the jury. . . . Because of the improper prejudicial remarks of counsel above considered, we have reached the conclusion that the judgment should be reversed.” (35 F. 2d at 27).

When the federal courts find that the prosecution’s use of “evidence” of such nature is deliberate and prejudicial misconduct reversal results; the courts do not allow the government to obtain convictions by inculcat-

ing in the jury a generalized belief that defendant must be guilty because the prosecutor uses hearsay consisting of newspaper articles and his own unsworn statements to imply that any one in a class of persons like the defendant must be guilty. For example, in *Nations v. United States*, 32 F. 2d 598 (8th Cir. 1929) defendant was prosecuted for violation of the prohibition laws. Defendant's case had received a great deal of publicity in the local press and the United States Attorney argued to the jury that the Associated Press and the entire metropolitan press of St. Louis believed that the defendant was guilty. The Court held this was prejudicial misconduct requiring reversal.

In *Dunn v. United States*, 307 F. 2d 883 (5th Cir. 1962) a prosecution for income tax evasion, defendant, mayor of a small city, was charged with receipt of unreported income in the form of "kick-backs" on city contracts. In the presence of the jury the prosecutor made statements which could only be interpreted as asserting that all politicians take "kick-backs". The statements were cited as prejudicial misconduct and the Court of Appeals reversed.

In the present case the Court allowed the prosecutor to admit hearsay statements in the form of his own questions and in the form of newspaper articles, all of which were well and deliberately calculated to implant in the mind of the jury the belief that out-of-state land developments in general were fraudulent and were being prosecuted right and left for mail fraud violations. When the prosecutor is allowed to bring such matters before a jury he doesn't need to take the additional step of stating himself that all out-of-state land subdivisions are suspect and therefore the defendants

are also suspect. The jury cannot avoid that conclusion. Of course, the Court informed the jury that statements by the prosecutor in the form of questions were not evidence, and that the statements in the newspaper articles were not admitted for the truth of the matter but merely because they had come to the defendant's attention. Appellant contends it is futile to believe that the Court's admonition could prevent a jury from believing exactly what the Court told them not to. As was stated in *Holt v. United States*, 94 F. 2d 90, 94 (10th Cir. 1937), a mail fraud prosecution:

"We doubt that it was possible for the jury to efface the statements from their minds and to consider the case solely on the competent evidence adduced. In fact, we find it difficult so to do. We are of the opinion that the instruction of the court to the jury to disregard the statement did not cure the error in its admission, and that the motion for a mistrial should have been granted."

To the same effect is *Mora v. United States*, 190 F. 2d 749 (5th Cir. 1951) which is also a case where the appellate court held that the trial court's admonition that the jury should disregard incompetent material did not cure the error in allowing prejudicial matter to go before the jury.

We have presented in detail two instances during the present trial where the prosecutor introduced incompetent, improper and prejudicial matter to the jury in order to implant a belief and arouse the impression that out-of-state land subdivision promotions in general were fraudulent in nature. Of course this is improper. Appellant is entitled to stand or fall on the evidence of his own guilt, not evidence of the guilt of

another (*United States v. Toner*, 173 F. 2d 140, 142 (3rd Cir. 1949)). Appellant, having the right to stand upon the evidence against him, ought not to be subject to the insinuation that anyone subdividing land and advertising it through magazines and newspapers is likely to be guilty of mail fraud. Such "evidence" is hearsay, incompetent, irrelevant and immaterial, and the deliberate use of such evidence by the prosecutor is highly improper and prejudicial.

**The Prosecutor's Misconduct  
Requires Reversal.**

The prosecutor must be fair and must avoid misconduct because the dignity and responsibility attaching to his office guarantees that his misconduct will prejudice the defendant's case both because of the improper and prejudicial matters placed before the jury and because of the impact upon the jury when it is the prosecutor who furnishes them with such prejudicial information (*Berger v. United States*, 295 U.S. 78, 79 L. ed. 1314, 1319-1321, 55 S. Ct. 629 (1934)).

Prejudice to defendant is more likely to result from the prosecutor's misconduct where the case is a close one (*Handford v. United States*, 249 F. 2d 295 (5th Cir. 1958)). However, persistent and pronounced misconduct of the prosecutor has a cumulative effect on the jury and may even require reversal where the case is not close. (*United States v. Sprengel*, 103 F. 2d 876 (3rd Cir. 1939)). So much prejudicial matter may be placed before the jury as to deprive defendants of a ". . . trial in accordance with substance and form of our criminal law . . ." and necessitate reversal despite overwhelming evidence of guilt (*United States v. Sprengel*, 103 F. 2d at 884-885). *I.e.*, where the prose-



cutor's misconduct is persistent, pronounced and protracted, the prejudice to the defendant may be so great as to deprive him of due process of law by depriving him of a fair trial (*Viereck v. United States*, 318 U.S. 236, 247, 87 L. ed. 737, 741 (1942); *Berger v. United States*, 295 U.S. 78, 88, 79 L. ed. 1314, 1321, 55 S. Ct. 629 (1934)).

Appellant submits that that is precisely what happened here, that the case was a close one where a far lesser degree of misconduct would require reversal, and that the misconduct here was so egregious that it deprived appellant of due process of law in the conduct of this trial.

In this case the principal defense was "the good faith" of appellant and his lack of intent to defraud anyone and his lack of knowledge that any misrepresentation was being made. At the close of the prosecution's case all defendants moved the court for a judgment of acquittal. The court denied the motions, preferring to submit the case to the jury. But the court noted that the question of good faith presented a very difficult and substantial question of fact for the jury [R. T. 9334-9335].

It is true that on occasion the trial court admonished the jury to disregard improper matters and that on occasion the trial court recognized that a cautionary instruction or admonition might actually worsen the misconduct rather than alleviate it and offered to give the cautionary instruction of admonition if defense counsel so desired. The nature of the misconduct in this case constituted "plain" error, so devastating in its effect as to be magnified in its influence on the jury by either objection on behalf of appellant or corrective



the ground that appellant withdrew from the venture on that date [C. T. 1035]. The court denied the motions for judgment of acquittal as to all counts except 2 and 3 [C. T. 1130]. The motions should have been granted as to all specified counts.

Appellant Reisman's involvement in the Gamble Ranch promotion is shown by the statement of facts herein. Reisman's initial involvement was as attorney for Benaron and Byrnes in drafting agreements between them and Clejan and later between them and the corporation. Except for a meeting on September 7 or 8, 1959, for this purpose, Reisman had nothing to do with the venture because he was out of the country traveling in Europe between about September 9 and October 27, 1959 [R. T. 12,942-12,944]. The trial court therefore properly granted appellant's motion for judgment of acquittal on Counts 1 and 2 which were based on mailings before October 13, 1959 [C. T. 1130].

After his return from Europe, appellant represented the Ranch from about November 6, 1959 in negotiating with the California Real Estate Commission to obtain the withdrawal of a cease and desist order against the company's sales of land in California and also to obtain a public report. Reisman represented the Gamble Ranch venture in that respect on various occasions until he withdrew from the activities of the company in the spring of 1962 [R. T. 12,953; 12,954-12,955; 12,963-12,964; 12,974-12,975; 12,977-12,978; 12,999; 13,001; 13,025-3,052; Exs. 1-237, B, B-1, AH, A, FN, CA].

On December 14, 1959 Reisman became president of the corporation [R. T. 12,993]. But he had no

ownership or equity in the Gamble Ranch venture until he acquired two per cent of the stock in June, 1960. At the end of 1960 he bought more stock which raised his percentage of ownership to thirteen per cent of the total [R. T. 13,054-13,057]. Reisman had no involvement with the company's advertising or any representations to the public until about mid-1960 when Albert Allen, attorney for Clejan, gave up the work of supervising the advertising and turned it over to Reisman. This occurred about mid-1960 [See testimony of John Roche, R. T. 1382-1385]. There is no evidence that appellant was an active member of the venture before the middle of 1960. Appellant's motion for judgment of acquittal should therefore have been granted as to Counts 40, 58 through 62, and 67, all of which are based on mailings before May 24, 1960.

The last public report from the Real Estate Commission was issued on April 23, 1962. Reisman resigned as a director of the corporation on June 15, 1962 [Pltf. Exs. 1-4, 5 and 6, minutes of meeting of corporation]. There is no evidence in the record to suggest that Reisman had any part in the activities of the corporation other than the passive interest of a shareholder after June 15, 1962. He resigned as an officer of the company at the same time he resigned as a director. Appellant's motion for judgment of acquittal should have been granted as to Counts 5, 12 through 19, 23, 26, 27, 38, 39, 41, 54, 55, 66, 71, 73, 74, 77, and 78 which were based on mailings after June 15, 1962 when appellant withdrew from the venture.

In *Levine v. United States*, 383 U.S. 265, 15 L. ed. 2d 737, 86 S. Ct. 925 (1966), ten persons were found guilty on each count of a ten-count indictment for

violation of the Mail Fraud Act. The Supreme Court granted “. . . petitions for writs of certiorari limited to the issue whether petitioners were improperly convicted of substantive offenses committed by members of the conspiracy before petitioners had joined in the conspiracy or after they had withdrawn from it.” Relying in part upon a concession of the Solicitor General the Supreme Court held that “. . . an individual cannot be held criminally liable for substantive offenses committed by members of the conspiracy before that individual had joined or after he had withdrawn from the conspiracy; . . .” (383 U.S. at 266-267; 15 L. ed. 2d at 738-739).

This decision states the law that is binding upon the Federal courts. In *Levine*, defendants were charged with conspiring to violate both the Securities Act of 1933 and the Mail Fraud Act. In the present case the effect of the indictment was to charge a complete violation of the Mail Fraud Act by reason of a conspiracy or scheme allegedly engaged in by all the defendants. The principal charging indictment in Count 1 alleged that “beginning on or about June 9, 1959 and continuing until the return of this indictment the [named defendants] . . . knowingly and wilfully intended and did devise a scheme and artifice to defraud purchasers and prospective purchasers of land known as ‘Gamble Ranch’. . . .”

The evidence in the record demonstrates that on June 9, 1959 the only defendant involved in this alleged scheme was defendant Arnold Clejan; that the other defendants joined the Gamble Ranch venture and thereby became parties to the alleged scheme at various dates after June 9, 1959. The theory of the prosecution was that all the defendants would be jointly

and vicariously liable for the acts of each other by reason of the scheme. In other words vicarious liability was imposed upon the theory of conspiracy law. Under the rule of the *Levine* case no defendant can be held liable for acts in furtherance of this conspiracy or scheme which acts took place “. . . before [such defendants] had joined the conspiracy [scheme] or after they had withdrawn from it.” The evidence is clear and undisputed that appellant Reisman had acted only as a lawyer for Benaron and Byrnes at the time of Counts 2 and 3, mailings of September 23 and October 13, 1959. The trial court properly dismissed these counts [C. T. 1130]. Thereafter, from about November 6, 1959 through about June, 1960 appellant Reisman acted as an attorney for the corporation, representing it before the California Real Estate Commission and on December 14, 1959 appellant Reisman became an officer and director of the corporation. However, he had no ownership or equity interest in the corporation until June, 1960 and not until mid-1960 did he have any participation whatsoever in the advertising of the corporation. Accordingly his role up to mid-1960 was simply that of attorney, acting in an advisory capacity and, as is done by many attorneys, accepting a position as an officer and director. Therefore, Counts 40, 58 through 62, and 67, all based on mailing before June, 1960 should have been dismissed.

Appellant Reisman withdrew from the venture on June 15, 1962 when he resigned as an officer and director. He participated no further in any of the business activities of the venture. Accordingly all counts based upon mailings taking place after June 15, 1962 should also have been dismissed. These are Counts 5, 12-19, 23, 26, 27, 38, 39, 41, 54, 55, 66, 71, 73, 74, 77, and 78.



V.

THE TRIAL COURT'S REFUSAL TO PERMIT  
APPELLANT TO EXAMINE THE GRAND JURY  
MINUTES BEFORE TRIAL DEPRIVED APPELLANT  
OF DUE PROCESS OF LAW IN VIOLATION OF  
THE FIFTH AMENDMENT TO THE  
CONSTITUTION OF THE UNITED STATES.

Introduction.

Before trial appellant made and joined in motions to inspect the transcript of testimony given before the grand jury on the ground that the transcript was needed adequately to prepare for trial [R. T. 136-143, 165; C. T. 134-37, 246, 271-72, 391-404]. It was argued that inspection should be allowed under the Due Process Clause of the Fifth Amendment to the United States Constitution [R. T. 137]. The court denied the motions [R. T. 141-142].

The Fifth Amendment commands that “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . .”<sup>\*</sup> The Constitution says nothing about secrecy of grand jury proceedings. Federal Rule of Criminal Procedure 6(e) permits disclosure to attorneys for the government “for use in the performance of their duties,” but disclosure to the defendant is allowed

“ . . . only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request

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<sup>\*</sup>In non-capital cases, the indictment procedure may be waived and the offense prosecuted by information (Rule 7(a), Fed. Rules of Crim. Procedure; *Smith v. United States*, 360 U.S. 1, 6, 79 S. Ct. 991, 3 L. ed. 2d 1041, 1046 (1959)).



of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.”

The Supreme Court has held that under Rule 6(e) the trial court has discretion to deny a defendant's request to examine grand jury minutes during the trial if the defendant fails to show that a “particularized need exists for the minutes which outweighs the policy of secrecy.” (*Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 400, 79 S. Ct. 1237, 3 L. ed. 2d 1323, 1327 (1959)). With rare exceptions (*e.g. United States v. Rose* (3d Cir. 1954), 215 F. 2d 617, 629-630 and *United States v. Remington* (2d Cir. 1951), 191 F. 2d 246, 250 [in prosecutions for perjury before grand jury, defendants allowed to examine their own grand jury testimony])), the federal courts have refused to permit pretrial inspection by a defendant.

The “particularized need” requirement should be re-examined in the light of modern legal thinking and increased concern for the rights of an accused. The history of grand jury secrecy demonstrates that the reasons for maintaining secrecy do not apply today. The “policy of secrecy” is based not on experience but on groundless hypothesis. The policy of secrecy is outweighed by the due process requirement that an accused be accorded a fair trial. A trial is unfair if the defendant is unable adequately to prepare for it. It is unfair to allow the prosecution to use grand jury minutes to prepare for trial while denying defendant that right.

The trial court's refusal to allow appellant to inspect the grand jury minutes before trial deprived appellant of due process of law in violation of the Fifth Amendment to the United States Constitution. To the extent that Federal Rule of Criminal Procedure 6(e) authorized the trial court's refusal, that Rule violates appellant's rights under the Fifth Amendment Due Process Clause.

#### **Background of Grand Jury Secrecy.**

The grand jury was created in England in 1166 by Henry II. Then called the Grand Assize, it first served as a prosecuting body, an arm of the Crown. It was invoked by the Crown to act as a public prosecutor for the purpose of returning indictments at the pleasure of the sovereign. During this early period evidence was heard in open court. The proceedings were never held in secrecy because the Crown could not control the results of secret deliberations (Calkins, *Grand Jury Secrecy*, 63 Mich. L. Rev. 455, 456-57 (1965); Elliff, *Notes On The Abolition Of The English Grand Jury*, 29 Am. J. Crim. Law & Criminology 3 (1938-39)). The grand jury functioned only in the interests of the Crown. The rights of private citizens were ignored. Independent deliberations were impossible so long as jurors were subject to reprisals from the government. An increasing desire by grand jurors for independence from the Crown thus led to a desire for secret proceedings. "Recognition of grand jury secrecy was motivated by a grave need for protecting the grand jury from the abuses of the Crown." (Calkins, *Grand Jury Secrecy*, 63 Mich. L. Rev. 455, 466 (1965)).

The concept of grand jury secrecy and independence first received judicial recognition in 1681 as a result of the *Earl of Shaftesbury* trial (8 How. St. Tr. 759, 771-774 (1681); 8 Wigmore, *Evidence* §2360 (McNaughton rev. 1961)). The Crown lodged charges against the Earl of Shaftesbury and convened a grand jury to hear evidence in open court. The jurors asked and were granted the right to conduct their deliberations in private chambers. Against the wishes of the Crown, the jury refused to indict. The case marked the end of the Crown's efforts to control the grand jury by requiring the publicity of their proceedings, or by polling the jurors (2 Campbell, *Lives of the Lord Chancellors* 363 (4th ed. 1857)). Investigations by grand juries, including the taking of testimony, were thereafter invariably conducted in privacy. The *Earl of Shaftesbury* case was "celebrated as a bulwark against the oppression and despotism of the Crown." (Calkins, *Grand Jury Secrecy*, 63 Mich. L. Rev. 455, 457 (1965); 8 Wigmore, *Evidence* §2360 (McNaughton rev. 1961)).

Thus the common law practice of grand jury secrecy was designed to protect the accused by assuring that the grand jury could conduct its investigations independently, free from pressures exerted by the sovereign. It "was never envisioned as an instrument to be invoked or waived as the prosecution saw fit." (Calkins, *Grand Jury Secrecy*, 63 Mich. L. Rev. 455, 456 (1965)). But for the despotic practices of the sovereign, grand jury secrecy would never have been necessary (See Sherry, *Grand Jury Minutes: The Unreasonable Rule Of Secrecy*, 48 Va. L. Rev. 668, 669).

By 1848 Englishmen were no longer afraid of their government. With the passing of the reason for the rule of secrecy came a change in the rule. The Indictable Offenses Act (11 & 12 Vict. C. 42 §§1, 27) of 1848 provided for the preliminary examination of the accused before a committing magistrate. It gave the accused the right to obtain copies of the depositions of the prosecution witnesses upon whose testimony the prisoner had been committed for trial. The Act limited the prosecution's proof at trial to the evidence disclosed at the preliminary hearing. The accused thereby obtained full pre-trial discovery of the prosecution's case (*United States v. Worcester*, 190 F. Supp. 548, 559 (D.C. Mass. 1960); Brennan, *Remarks on Discovery*, 33 F.R.D. 56, 59; Seltzer, *Pre-Trial Discovery of Grand Jury Testimony In Criminal Cases*, 66 Dick L. Rev. 379 (1961-1962)). The preliminary hearing procedure in time rendered the grand jury obsolete and, accordingly, in 1933 the grand jury was abolished in England. (The Administration of Justice (Miscellaneous Provisions) Act, 23 & 24 Geo. 5, c. 36 §1 (1933); *United States v. Worcester*, 190 F. Supp. 548, 559 (D.C. Mass. 1960); Calkins, *Grand Jury Secrecy*, 63 Mich. L. Rev. 455, 469 (1965)).

**The "Policy of Grand  
Jury Secrecy" in the  
United States.**

The adoption in this country of the common law rule of grand jury secrecy appears to have been automatic and ill considered. We imported the English rule without recognizing that the conditions that made secrecy necessary in England never existed here. American



grand jurors are not afraid of their government. In England the accused desired the protection of privacy. In this country the accused, not the government, seeks disclosure of grand jury proceedings. Appellant is in no sense protected by testimony given in private. The benefit of secrecy now inures solely to the prosecution. And it is by the prosecution that secrecy is demanded. The reasons are obvious. In a secret hearing, the prosecutor has free reign to obtain *ex parte* depositions of witnesses whose testimony will never be known to the accused until he hears it given against him at the trial. The opportunities for abuse are well known. The prosecutor "may with impunity persuade grand juries without any legal evidence, either by hearsay testimony, undue influence, or worse means, to indict whom they will, and there is no way in which the courts may annul such illegal transactions. . . ." (*Schmidt v. United States* (6th Cir. 1940), 115 F. 2d 394, 397), The government has no legitimate interest in obtaining convictions by insuring that the accused cannot adequately prepare his case. Under such circumstances

" . . . the grand jury, instead of that *protection of the citizen against unfounded accusation*, whether it comes from government or be prompted by partisan passion, or private enmity . . . *which it was primarily designed to provide*, may become an engine of oppression and a mockery of justice." (*Schmidt v. United States* (6th Cir. 1940), 115 F. 2d 394, 397. Emphasis added).

If secret proceedings are no longer needed to protect the accused from the state by permitting independent investigation, what is the justification for the endurance of the "policy of secrecy?" The arguments



advanced in behalf of secrecy today are very different from those originally made. (See Calkins, *Grand Jury Secrecy*, 63 Mich. L. Rev. 455, 458 (1965)). Five reasons are commonly given for maintaining secrecy: (1) To prevent the accused's escape before indictment; (2) To protect the reputation of the accused who is not indicted; (3) To prevent the importuning of grand jurors; (4) To prevent tampering with grand jury witnesses who later testify at trial; (5) To encourage free disclosure of facts by witnesses (*United States v. Amazon Industrial Chemical Corp.* (D.C. Md. 1931), 55 F. 2d 254, 261; *United States v. Rose* (3d Cir. 1954), 215 F. 2d 617). These arguments are analyzed below under the heading "Re-examination of Policy of Secrecy." Despite the loyalty of the courts to the policy of secrecy, however, the decisions have permitted disclosure of grand jury testimony "discretely and limitedly" (*Dennis v. United States*, 384 U.S. 855, 869, 86 S. Ct. 1840, 16 L. ed. 2d 973, 983 (1966)) upon a showing by the defendant of "particularized need." (See, e.g., *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 400, 79 S. Ct. 1237, 3 L. ed. 2d 1323, 1327 (1959)).

#### **The "Particularized Need" Rule.**

Federal criminal procedure has erected barriers to discovery by the defendant that make it possible for the prosecution to conceal a substantial part of its case from the accused. "The elimination of precise pleading, the general unavailability of particulars, and the increasing elasticity given to indictments all leave a good deal of room for 'surprise' at trial." (Goldstein, *The State & The Accused: Balance Of Advantage In Crim-*

*inal Procedure*, 69 Yale L.J. 1149, 1180). But in federal civil cases—involving money and property instead of life and liberty—broad pretrial discovery is allowed so that surprise will be minimized (Fed. R. Civ. P. 26-37; 4 Moore, *Federal Practice* §§26.02-.03 (1950)). Depositions, interrogatories, requests for admissions and discovery of documents have as their objects “the harnessing of the full creative potential of the adversary process, bringing each party to trial as aware of what he must meet as his finances and his lawyer’s energy and intelligence permit.” (Goldstein, *The State & The Accused: Balance Of Advantage In Criminal Procedure*, 69 Yale L.J. 1149, 1180).

The defendant in a federal criminal case cannot request admissions from the Government, and except to perpetuate testimony of a witness who will be unavailable for trial (Fed. R. Crim. P. 15) he cannot take depositions. And when “the case is placed in the grand jury’s hands, it is shrouded with secrecy.” (Goldstein, *The State & The Accused: Balance Of Advantage In Criminal Procedure*, 69 Yale L.J. 1149, 1184). The accused may not inspect any portion of the grand jury minutes unless he shows that a “particularized need exists for the minutes which outweighs the policy of secrecy.” (*Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 400; 79 S. Ct. 1237, 3 L. ed. 2d 1323, 1327 (1959)). The Government, on the other hand, has full access to the transcript (Fed. R. Crim. P. 6(e)). Without having to show particularized need, or any need at all, the Government may use the transcript in preparing for trial (*United States v. Procter & Gamble Co.*, 356 U.S. 677, 78 S. Ct. 983, 2 L. ed. 2d 1077 (1958) [civil anti-trust suit instituted after

grand jury failed to indict]), and during the trial for many purposes; *e.g.*, to refresh the recollection of witnesses (*United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 233, 60 S. Ct. 811, 84 L. ed. 1129, 1173); to impeach hostile witnesses (*Bosselman v. United States*, 239 Fed. 82, 85 (2d Cir. 1917), *Di Carlo v. United States*, 6 F. 2d 364, 367-368 (2d Cir. 1925)); and in some cases to read into evidence testimony given before the grand jury (*Metsler v. United States*, 64 F. 2d 203, 206 (9th Cir. 1933)).

“In sum, if police or prosecution choose to withhold from the defendant their evidence or legal theories, or if they continue the preliminary hearing until indictment, the defendant has only the notice given him by the indictment, the occasional bill of particulars, and the even more occasional pretrial discovery.” (Goldstein, *The State & The Accused: Balance Of Advantage In Criminal Procedure*, 69 Yale L.J. 1149, 1185.)

Thus the requirement of showing particularized need to obtain production of the grand jury transcript is a burden placed on the defendant alone. The meaning and development of the particularized need rule is seen in three principal United States Supreme Court cases, *United States v. Procter & Gamble Co.*, 356 U.S. 677, 68 S. Ct. 983, 2 L. ed. 2d 1077 (1958); *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 79 S. Ct. 1237, 3 L. ed. 2d 1323 (1959), and *Dennis v. United States*, 384 U.S. 855, 86 S. Ct. 1840, 16 L. ed. 2d 973 (1966). The first case, *United States v. Procter & Gamble Co.* (1958), *supra*, was a civil anti-trust suit commenced after a grand jury hearing failed to produce an indictment. The Government was using the

grand jury transcript to prepare its case and the defendants sought the same privilege by moving for pre-trial production of the transcript under Federal Rule of Civil Procedure 34. The Supreme Court held that the "good cause" requirement of Rule 34 may be met only by a showing of "particularized need" and that defendants were not entitled to the transcript because they failed to establish a "compelling necessity" for its production (356 U.S. at 682-683; 2 L. ed. 2d at 1081-1082).

In the second case, *Pittsburgh Plate Glass Co. v. United States* (1959), *supra*, the Supreme Court, in an opinion shared by five of its members, held that the necessity of showing particularized need under Civil Rule 34 also governed the trial court in exercising its discretion under Criminal Rule 6(e). The majority held that neither the rule of *Jencks v. United States*, 353 U.S. 657, 77 S. Ct. 1007, 1 L. ed. 2d 1103 (1958), nor the Jencks Act, 18 U.S.C. §3500, applied to discovery of grand jury minutes. In the *Jencks* case the Supreme Court held that the defendant was entitled to an order directing the Government to produce for inspection all statements and reports of two Government witnesses, relating to the trial testimony of the witnesses. The reports were made by the witnesses to the F.B.I. The Court disapproved the practice of producing Government documents to the trial judge for his determination of relevancy and materiality without hearing the accused. Only after inspection by the accused may the trial judge determine admissibility. And since the accused cannot show that the prior statements conflict with the trial testimony of the witnesses until he sees the statements, the accused may inspect the statements without showing a conflict. "Jus-



tice requires no less.” (353 U.S. at 668, 1 L. ed. 2d at 1112). Congress promptly limited the scope of the *Jencks* case by passing the so-called Jencks Act (18 U.S.C. §3500) which provides (1) that the accused is entitled to the statement of a Government witness in the possession of the Government only after the witness has testified, and (2) that the court must inspect the statement *in camera* and excise portions it considers irrelevant if the Government claims that the statement does not relate to the testimony of the witness.

Because the majority in *Pittsburgh Plate Glass Co.*, *supra*, held that disclosure of grand jury minutes is covered by Criminal Rule 6(e) rather than by either the *Jencks* case or the Jencks Act, the accused was held not entitled to automatic disclosure of portions of the transcript relating to the testimony of Government witnesses. Disclosure of grand jury minutes is “committed to the discretion of the trial judge” under Rule 6(e). Secrecy will not be lifted except upon a showing of particularized need (360 U.S. at 399, 3 L. ed. 2d at 1326). The dissent was written by Mr. Justice Brennan, the author of the majority opinion in *Jencks*, and joined by Chief Justice Warren and Justices Black and Douglas. The dissenters thought the *Jencks* case should control disclosure of grand jury minutes. The defendant should be automatically entitled to see portions of the grand jury transcript relating to the direct testimony at the trial of Government witnesses. The defendant should not have to convince the trial court that he has a particularized need for the testimony. The task of the trial judge “should be completed when he has satisfied himself what part of the grand



jury testimony covers the subject matter of the witness' testimony on the trial, and when he has given that part to the defense." (360 U.S. at 410, 3 L. ed. 2d at 1332). The majority's "insistence on secrecy exalts the principle of secrecy for secrecy's sake. . . ." (360 U.S. at 407, 3 L. ed. 2d at 1331).

The third Supreme Court case dealing with the particularized need rule is *Dennis v. United States*, 384 U.S. 855, 86 S. Ct. 1840, 16 L. ed. 2d 973 (1966). There the Court unanimously held that the defendants established a particularized need for disclosure of the grand jury testimony of four trial witnesses by showing:

- (1) The witnesses' memories were fresher when they testified before the grand jury;
- (2) The four witnesses were key witnesses;
- (3) The testimony concerned conversations. When the question is what was said, the defendants should be able to ascertain the precise substance of the statements;
- (4) Two of the witnesses were accomplices of defendants and a third had reasons for hostility toward defendants;
- (5) One witness admitted he was mistaken in earlier statements about dates.

The *Dennis* case represents a liberalization of the particularized need rule based on "the growing realization that disclosure, rather than suppression, of relevant material ordinarily promotes the proper administration of criminal justice." (384 U.S. at 870, 16 L. ed. 2d at 984.) The Court did not decide whether a defendant

has an absolute Constitutional right to pretrial disclosure of grand jury minutes because that issue was not presented. But the case is clear evidence of a growing disenchantment by the Court with a "policy of secrecy" that deprives an accused of evidence essential to adequate trial preparation. The Court took note of the Second Circuit practice of allowing the trial judge to inspect the grand jury transcript *in camera* and to give it to the defendant only if the judge finds inconsistencies between the grand jury and the trial testimony of a government witness (See *United States v. Zborowski*, 271 F. 2d 661, 668 (2d Cir. 1959); *United States v. Spangelet*, 258 F. 2d 338 (2d Cir. 1958)). Without disapproving the Second Circuit practice, the Court held that "it by no means disposes of the matter." (384 U.S. at 874, 16 L. ed. 2d at 986). The defendant and his lawyer are the best judges of material that will benefit the defense. When the defendant shows a particularized need for disclosure the judge must furnish the defendant with pertinent parts of the transcript.

"The determination of what may be useful to the defense can properly and effectively be made only by an advocate. The trial judge's function in this respect is limited to deciding whether a case has been made for production, and to supervise the process." (384 U.S. at 875, 16 L. ed. 2d at 986.)

Following the *Dennis* decision, the Second Circuit abolished its *in camera* inspection procedure (*United States v. Youngblood*, 379 F. 2d 365 (2d Cir. 1967)). A defendant who makes a showing of particularized need for grand jury minutes now "is entitled to examine them even if the court's *in camera* examination re-

vealed nothing that could be of any conceivable value to the defense.” (*United States v. Youngblood*, *supra*, 379 F. 2d at 369). Under the new Second Circuit procedure it is no longer indispensable to an order of disclosure that defendant even make a showing of particularized need.

“While *United States v. Procter & Gamble Co.*, . . . and *Pittsburgh Plate Glass Co.*, . . . hold that grand jury testimony need not be provided to the defendant unless he makes a showing of particularized need . . . we do not read these cases to limit the discretion of the trial court to order disclosure to the defendant under Federal Rule of Criminal Procedure 6(e) only when such a showing is made. These cases merely indicate a minimum standard to which the courts must adhere, and *do not limit the court’s power to order disclosure in additional situations where a showing of particularized need has not been made.*” (*United States v. Youngblood*, *supra*, 379 F. 2d at 369. Emphasis added).

Thus in the Second Circuit the trial court may now permit the defendant to inspect grand jury minutes even without a showing of particularized need. The Supreme Court cases dealing with particularized need merely require trial courts to grant disclosure in all cases of particularized need, but do not require the courts to refuse disclosure where there is no particularized need. In *State of Washington v. American Pipe & Construction Co.*, 41 F.R.D. 59, 63-64 (D.C. Wash. 1966) the Court followed *Dennis* and said:

“It is now well settled that disclosure rather than suppression of relevant materials in grand

jury minutes ordinarily promotes the proper administration of justice, both civil and criminal, and it is no longer necessary in every case that the trial judge, like a fussy hen, scratch through the grand jury transcript *in camera* before permitting of relevant testimony therein."

The *Youngblood* and *Washington* cases reflect the growing tendency of state and federal courts, and of legal writers and authorities, to examine critically the particularized need rule and the "policy of secrecy" on which it is founded. If the policy of secrecy was ever justifiable it is not today.

#### Re-examination of the "Policy of Secrecy".

Decisions that require the accused to carry the burden of showing his need for disclosure of grand jury minutes (*e.g. Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 79 S. Ct. 1237, 3 L. ed. 2d 1323 (1959); *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150, 60 S. Ct. 811, 84 L. ed. 1129 (1939)), peremptorily exalt the policy of secrecy, which operates only in favor of the prosecution, over other firmly established policies designed to protect the accused. For example, "it is certainly the policy of the law that one accused of crime shall have every opportunity to prove his innocence." (*Atwell v. United States*, 162 Fed. 97, 100 (4th Cir. 1908)). The policy of the law permits disclosure rather than suppression of relevant materials. (*In re Bullock*, 103 F. Supp. 639, 642 (D.D.C. 1952); *State of Washington v. American Pipe & Constr. Co.*, 41 F.R.D. 59, 63-64 (D.C. Wash. 1966)). "It is the policy of the law that truth be ascertained."



(Calkins, *Grand Jury Secrecy*, 63 Mich. L. Rev. 455, 463 (1965)). Federal decisions have recognized exceptions to the policy of secrecy under Rule 6(e). (*E.g.*, *United States v. Rosenberg*, 245 F. 2d 870 (3d Cir. 1957) (impeachment of witnesses); *United States v. Rose*, 215 F. 2d 617, 629-630 (3d Cir. 1954) and *United States v. Remington*, 191 F. 2d 246, 250 (2d Cir. 1951) (defendant allowed to inspect his own grand jury testimony in trial for perjury before the grand jury); *Doe v. Rosenberry*, 152 F. Supp. 403 (S.D. N.Y. 1957) (bar association disciplinary proceedings, a matter of public interest); *United States v. Sugarman*, 139 F. Supp. 878 (D.C.R.I. 1956) (gross irregularities in the grand jury investigation which would vitiate the indictment); *In re Bullock*, 103 F. Supp. 639 (D.D.C. 1952) (dereliction of duty by police officer, a matter of public interest); see 8 Wigmore, *Evidence* §2363 (McNaughton Rev. 1961). But in the vast majority of cases the prosecution has only to invoke the policy of secrecy and the grand jury minutes are automatically immunized from inspection by the accused. Policies favoring the accused vanish in a confrontation with the policy of secrecy brandished by the prosecutor. To require the accused to overcome the policy of secrecy is to approve "an uncritical exaltation of secrecy for secrecy's sake," an "indiscriminate condemnation of disclosure under the shibboleth of 'Secrecy'." (Louisell, *Criminal Discovery: Dilemma Real Or Apparent?* 49 Calif. L. Rev. 46, 69-70). Mr. Justice William J. Brennan recently observed that

"... the implication in the argument against discovery is that the accused is guilty, so that he really has no complaint that his counsel is denied



access to the same materials to aid him better to develop the whole truth. In other words, the prosecution may eat its cake and have it too. To that degree, does not the denial of adequate discovery set aside the presumption of innocence—is not such denial blind to the superlatively important public interest in the acquittal of the innocent?” (*Remarks on Discovery*, 33 F.R.D. 56, 57).

Consistent with “the growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of justice” (*Dennis v. United States*, 384 U.S. 855, 870, 86 S. Ct. 1840, 16 L. ed. 2d 973, 984 (1966)), courts, legislatures and legal scholars have closely studied the five traditional reasons (see, *e.g.*, *United States v. Amazon Industrial Chem. Corp.*, 55 F. 2d 254, 261 (D.C. Md. 1931)) advanced as justification for grand jury secrecy. These inquiries have produced almost unanimous agreement that the five reasons have no application after the grand jury’s investigation is ended and an indictment is returned. Each reason will be separately considered.

**(1) Does Secrecy Prevent the Escape of a Suspect  
Who May Be Indicted?**

One of the conventional reasons given for maintaining grand jury secrecy is “To prevent the escape of those whose indictment may be contemplated.” (*United States v. Amazon Industrial Chemical Corp.*, 55 F. 2d 254, 261 (D.C. Md. 1931); *United States v. Rose*, 215 F. 2d 617, 628-29 (3d Cir. 1954); 9 Wigmore, *Evidence* §2360 (McNaughton rev. 1961); *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 405,

79 S. Ct. 1237, 3 L. ed. 2d 1323, 1330 (1959) (dissenting opinion of Mr. Justice Brennan)). It is obvious that after indictment and arrest this excuse for secrecy "disappears, in regard to the accused's opportunity to escape, as soon as he either escapes or is arrested, and cannot therefore have any bearing upon later stages of the proceeding." (8 Wigmore, *Evidence* §§2361-2362 (McNaughton rev. 1961). Accord, see Sherry, *Grand Jury Minutes: The Unreasonable Rule Of Secrecy*, 48 Va. L. Rev. 668, 677-78; Seltzer, *Pre-Trial Discovery Of Grand Jury Testimony In Criminal Cases*, 66 Dick. L. Rev. 379, 383-84; Louisell, *Criminal Discovery: Dilemma Real Or Apparent?* 49 Calif. L. Rev. 56, 68-71; *The Impact of Jencks v. United States & Subsequent Legislation On The Secrecy Of Grand Jury Minutes*, 27 Fordham L. Rev. 244, 245).

As with the fear of escape, it will be seen that the other four reasons for the policy of secrecy disappear after indictment.

"But does this policy require secrecy as to the evidence adduced before the grand jury after such jury has made presentment and indictment . . . We think not; because another principle of the law's policy intervenes. It is certainly the policy of the law that one accused of crime have every opportunity to prove his innocence . . . its policy demands that the accused shall have the fairest and fullest opportunity to make clear his innocence." (*Atwell v. United States*, 162 Fed. 97, 100 (4th Cir. 1908)). Accord, see *Metzler v. United States*, 64 F. 2d 203, 206 (9th Cir. 1933); *United States v. Alper*, 156 F. 2d 222, 226 (2d

Cir. 1946); *United States v. Zborowski*, 271 F. 2d 661, 668 (2d Cir. 1959); *Beatrice Foods Co. v. United States*, 312 F. 2d 29, 39 (8th Cir. 1963).

(2) Does Secrecy Protect the Person Who Is Investigated but Not Indicted?

The proponents of secrecy advance as their second argument: "To protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation and from the expense of standing trial where there was no probability of guilt." (*United States v. Amazon Industrial Chemical Corp.*, 55 F. 2d 254, 261 (D.C. Md. 1931); *United States v. Rose*, 215 F. 2d 617, 628-29 (3d Cir. 1954).) Appellant has been indicted. Any "protection" that appellant might have derived from the refusal to allow him to see the minutes has long since disappeared. This alleged "protection" obviously has no application to a defendant who has been indicted. (See, *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 406, 79 S. Ct. 1237, 3 L. ed. 2d 1323, 1330 (1959) (dissenting opinion of Mr. Justice Brennan); Louisell, *Criminal Discovery: Dilemma Real or Apparent?* 49 Calif. L. Rev. 56, 68-71; *The Impact Of Jencks v. United States & Subsequent Legislation On The Secrecy Of Grand Jury Minutes*, 27 Fordham L. Rev. 244, 245).

(3) Does Secrecy Prevent Harassment and Importuning of Grand Jurors and Insure Freedom of Deliberations?

A third justification offered for maintaining secrecy is: "To insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to

indictment or their friends from importuning the grand jurors.” (*United States v. Amazon Industrial Chemical Corp.*, 55 F. 2d 254 (D.C. Md. 1931); *United States v. Rose*, 215 F. 2d 617, 628-29 (3d Cir. 1954)). Appellant did not seek disclosure of grand jury proceedings or evidence before the indictment. He did not ask for names or votes of grand jurors. Votes of grand jurors and other proceedings of the grand jury that do not involve the giving of testimony may be excised from the transcript. (*United States v. Grunewald*, 162 F. Supp. 621, 622 (S.D.N.Y. 1958)). As Mr. Justice Brennan observed in his dissent in *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 407, 79 S. Ct. 1237, 3 L. ed. 2d 1323, 1331 (1959):

“... the defense seeks nothing which would disclose the votes or opinions of any of the grand jurors involved in these proceedings . . . If there are questions by grand jurors intertwined with Jonas’ testimony disclosure of which would indicate the jurors’ opinions or be embarrassing to them, the names of the grand jurors asking the questions can be excised.”

Appellant had no opportunity to importune grand jurors whose names he did not know. He could not influence their decision to indict him after they had made the decision. And of course there has been no suggestion, and certainly no evidence, that appellant wanted or attempted to influence the grand jurors’ deliberations. This third reason for secrecy

“... does not stand analysis as an argument against discovery, because it is not disclosure of deliberations that is sought but testimony of witnesses, and discovery of course is not possible un-



til after the indictment is rendered when the chance to importune is gone.” (Louisell, *Criminal Discovery: Dilemma Real Or Apparent?* 49 Calif. L. Rev. 56, 70 (1961)).

Thus it is plain that any privilege belonging to the grand jurors is simply a “guarantee that by no legal process will the disclosure of their *votes and their expressions of opinion* in the jury room be compelled.” (8 Wigmore, *Evidence* §2361 (McNaughton rev. 1961). Emphasis in original; *The Impact of Jencks v. United States & Subsequent Legislation On The Secrecy Of Grand Jury Minutes*, 27 Fordham L. Rev. 244, 245). Since appellant does not seek votes or opinions of grand jurors, this third reason cannot reasonably be asserted to prevent disclosure.

(4) Does Secrecy Prevent Subornation of Perjury or Tampering With Grand Jury Witnesses Who Later Testify at Trial?

It is next asserted that grand jury secrecy serves “To prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it.” (*United States v. Amazon Industrial Chemical Corp.*, 55 F. 2d 254 (D.C. Md. 1931), *United States v. Rose*, 215 F. 2d 617, 628-29 (3d Cir. 1954)). This argument does not withstand analysis. It mechanically raises in importance the so-called policy of secrecy over all the safeguards and policies designed to protect the accused. To the charge that the accused may resort to perjured testimony, “the answer usually given is that the defendant is entitled to the presumption of innocence until the contrary is established.” (Seltzer, *Pre-*



*Trial Discovery Of Grand Jury Testimony In Criminal Cases*, 66 Dick. L. Rev. 379, 383-84.) Indeed, secrecy may accomplish the opposite of the intended result. It may "invite possible perjury. This would be the case were any . . . witness, from that very fact, to be free from any possible later inquiry as to his testimony before the Grand Jury in that regard." (*United States v. Ben Grunstein*, etc., 137 F. Supp. 197, 201 (D.C. N.J. 1955); Calkins, *Grand Jury Secrecy*, 63 Mich. L. Rev. 455, 462 (1965)). "The true safeguard against perjury is not to refuse to permit any inquiry at all, for that will eliminate the true as well as the false, but the inquiry should be so conducted as to separate and distinguish the one from the other where both are present.'" (Brennan, *Remarks on Discovery*, 33 F.R.D. 56, 62. See also 8 Wigmore §2362 (McNaughton rev. 1961)).

In *State v. Faux*, 9 Utah 2d 350, 345 P. 2d 186, 187 (1959) the Supreme Court of Utah examined and rejected the five traditional reasons for maintaining secrecy. With regard to the possibility of perjured testimony, the Court said:

"It will be noted that after the indictment is returned and an accused is arrested, the reasons for secrecy have largely been spent. As the writer views it, the furnishing of a defendant with a basis for preparation of perjured testimony has little or no validity. If he will engage in such unlawful machinations, the time element is not going to prevent it and other processes of law must cope with such unlawful conduct." (345 P. 2d at 187.)

Opponents of enlarged discovery are always certain that the reduction of surprise will surely facilitate perjury. But the “underlying predicate [of this argument is] that potential abuse universally condemns a technique—which is the antithesis of the philosophy undergirding civil discovery.” (Louisell, *Criminal Discovery: Dilemma Real Or Apparent?* 49 Calif. L. Rev. 56, 70 (1961)). Of this perjury fear, Mr. Justice Brennan said:

“That old hobgoblin perjury, invariably raised with every suggested change in procedure to make easier the discovery of the truth is again disinterred from the grave where I had thought it was forever buried under the overwhelming weight of the complete rebuttal supplied by our experience in civil cases where liberal discovery has been allowed. (*State v. Tune*, 13 N.J. 203, 98 A. 2d 881, 884 (1953) (dissenting opinion of Mr. Justice Brennan, then a member of the New Jersey Supreme Court); *Remarks on Discovery*, 33 F.R.D. 56, 62).

Appellant was presumed to be innocent after the indictment was returned. There is no justification for depriving him of this presumption by substituting the presumption that he will obtain perjured testimony to conceal his guilt. Nor is it a sufficient answer to say, after the fact, that appellant has now been convicted and that his innocence is no longer presumed. The government cannot deprive an accused of the opportunity to prove his innocence and then capitalize on the deprivation by showing that because of it the accused was unable to establish his innocence. There is of course no evidence that appellant, a lawyer of high reputation

and standing in the community, attempted to secure perjured testimony. Lacking evidence the prosecution must rest its opposition to disclosure on a presumption that defies experience and logical analysis. The presumption that appellant would suborn perjury of grand jury witnesses at trial if he could review the transcript should not be given credence in this case.

(5) Does Secrecy Encourage Free Disclosure of Information by Witnesses Who Would Otherwise Not Freely Testify?

The final argument against disclosure of grand jury minutes is that secrecy is necessary "To encourage free and untrammelled disclosure by persons who have information with respect to the commission of crimes." (*United States v. Amazon Industrial Chemical Corp.*, 55 F. 2d 254, 261 (D.C. Md. 1931); *United States v. Rose*, 215 F. 2d 617, 628-29 (3d Cir. 1954)). The necessary corollary of this argument is the assumption that witnesses will not freely disclose information if they know that the accused will learn of their grand jury testimony. This reason for secrecy is without support in reason or experience.

The witness who reveals evidence damaging to the accused before the grand jury must expect that such evidence will be disclosed by the prosecution at trial. The giving of testimony tending to prove the accused guilty will be compelled by the prosecution. (8 Wigmore, *Evidence* §2362 (McNaughton rev. 1961)). "No one even contends to the contrary. If the rule were otherwise, this purpose [that the full truth be revealed] would be thwarted and the witnesses might tell irresponsible tales before Grand Juries." (*State v. Faux*,

9 Utah 2d 350, 345 P. 2d 186, 188 (1959)). “Therefore, any hesitancy that a witness might have in divulging harmful evidence before the grand jury would be based upon a fear of the eventual necessity of giving the same evidence *in open court* rather than the fear that, having once given such harmful evidence, his grand jury testimony might be divulged. Disclosure of the prior testimony will not unduly discourage free statements by witnesses before the grand jury.” (Calkins, *Grand Jury Secrecy*, 63 Mich. L. Rev. 455, 461 (1965). Emphasis added).

Professor Wigmore places in its proper perspective the question of willingness to testify.

“If the grand jury *indicts* D on W’s testimony, it is plain that secrecy is no longer of any avail, for W will be summoned as a witness at the trial and will be compellable to testify. If he tells the truth and the truth is the same as he testified before the grand jury, the disclosure of the former testimony cannot possibly bring to him any harm (in the shape of corporal injury or personal ill will) which his testimony on the open trial does not equally tend to produce. If on the other hand his testimony now is inconsistent with that before the grand jury, the privilege ought not to apply. The need for the evidence in the criminal prosecution of defendant exceeds any injury that would inure to the witness-grand jury relation.” (8 Wigmore, *Evidence* §2362 (McNaughton rev. 1961). Emphasis in original. See also *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 407, 79 S. Ct. 1237, 3 L. ed. 2d 1323, 1331 (1959) (dissent of Mr. Justice Brennan)).



Appellant did not observe that government witnesses were reluctant to testify in open court. A reading of the transcript in this case and some of the incredible charges made by government witnesses betrays anything but timidity. This final justification for secrecy is, like the other four, based on hypothetical premises that disappear in the face of close scrutiny. Secrecy may actually invite perjury. Secure in the confidence that their testimony will be closeted by secrecy, grand jury witnesses may vent their spleen against an accused by resort to pure fiction and gross exaggeration.

The government has no legitimate interest in maintaining grand jury secrecy after an indictment is returned. If "the fundamental purpose of a criminal trial is not solely to convict the accused" but "to seek the truth and administer justice" (*State v. Faux*, 9 Utah 2d 350, 345 P. 2d 186, 188-189 (1959)), the desire of the prosecution to maintain secrecy so the accused cannot adequately prepare his defense is not legitimate. If "‘The United States wins its point whenever justice is done’" (*Brady v. Maryland*, 373 U.S. 83, 87-88, 83 S. Ct. 1194, 10 L. ed. 2d 215 (1963)), appellant should have been given the right, exercised by the government, to use the grand jury transcript to prepare for trial. "Certainly without actual evidence and upon conjecture merely, and in the face of the contrary proof of our experience in civil causes, we ought not in criminal cases, where even life itself may be at stake, forswear in the absence of clearly established danger a tool so useful in guarding against the chance that a trial will be a lottery or mere game of wits and the result at the mercy of the mischiefs of surprise." (*State v. Tune*, 13 N.J. 203, 98 A. 2d 881, 884



(1953) (dissent of Mr. Justice Brennan, then a member of the New Jersey Supreme Court); Brennan, *Remarks on Discovery*, 33 F.R.D. 56, 62.)

After analyzing the reasons given for maintaining secrecy, Professor Wigmore concludes that “[t]here remain, . . . on principle, no cases at all in which, *after the grand jury’s functions are ended*, the privilege of witnesses not to have their testimony disclosed should be deemed to continue.” (8 Wigmore, *Evidence* §2362 (McNaughton rev. 1961). Emphasis in original). If it is apparent “on principle” that the traditional reasons for secrecy have no validity after indictment, the lessons to be drawn from actual experience even more dramatically compel Wigmore’s conclusion. Proponents of secrecy argue that the necessity for secrecy is dictated by experience. But to what experience can they point to support this conclusion? The answer is that they have had no such experience. In fact, the information gleaned from actual experience demonstrates the speciousness of the arguments against disclosure.

#### **The English Experience.**

As seen above, England abolished grand jury secrecy when it was no longer necessary to protect jurors from intimidation by the Crown. In 1848 the Indictable Offenses Act (11 & 12 Vict. c. 42 §§1, 27) provided for commitment by a preliminary examination procedure as an alternative to grand jury presentment. At the preliminary examination the accused obtained full pre-trial discovery of the prosecution’s case (Seltzer, *Pre-Trial Discovery Of Grand Jury Testimony In Criminal Cases*, 66 Dick. L. Rev. 379 (1961-1962)). By 1933 the preliminary hearing pro-

cedure was used almost exclusively and the grand jury was abolished (The Administration Of Justice (Misc. Provisions) Act, 23 & 24 Geo. 5, c. 36 §1 (1933); *United States v. Worcester*, 190 F. Supp. 548, 559 (D.C. Mass. 1960)).

What has been the result on English criminal justice of grand jury abolition? One observer noted that in England today "nobody mentions it, nobody regrets it, nobody is any the worse off." (Elliff, *Notes On The Abolition Of The English Grand Jury*, 29 Amer. Journal of Crim. Law & Crimonology 3 (1938-1939)). Of the continued use of the grand jury in the United States, an English commentator said, "'We took a long time to perform the necessary operation ourselves, so we must not be critical of other communities for delay, though it is an odd fact that more antiquated English legal procedure survives in America than here.'" (*Id.* at 22). Appellant is of course not suggesting that the grand jury system, provided for in the Fifth Amendment, be abolished in this country. But in deciding whether the traditional reasons given for maintaining secrecy after indictment have validity we should not blind ourselves to the experience of jurisdictions that have done away with secrecy. In England, where for over 100 years the accused has enjoyed full discovery rights, the fears of those who oppose the end of secrecy have been exposed as unrealistic. "[I]n England no prospective witnesses or others have raised objections to disclosure at the magistrates' preliminary stage of evidence that may or may not be offered at the trial itself." (*United States v. Worcester*, 190 F. Supp. 548, 559 (D.C. Mass. 1960)).

It has been argued that the English analogy is not relevant to problems of criminal justice in the United States. Mr. Justice William J. Brennan answers that argument as follows:

“The . . . argument is that the experience of other nations where broad discovery has not subverted the criminal law, notably, England and Canada, does not help us here in America. I can’t as readily . . . disregard the absence of the conjured dangers in England and Canada under a form of discovery, as I have said, advantaging the accused far beyond anything presently in or proposed for our system. First of all, the argument that crime is increasing at a greater rate in America than in those countries would, I think, come as a surprise to their law enforcement officers. But if it is true that we are a less law-abiding people than the British, how explain the satisfaction with broad criminal discovery of our neighbor Canada between whose mores and our own similarities are so often remarked?” (*Remarks on Discovery*, 33 F.R.D. 56, 64-65).

We adopted from England the rule of secrecy when we did not have England’s reason for secrecy. Since we so faithfully followed the example of England in adopting grand jury secrecy we should not shut our eyes to England’s reasons for abolishing it.

#### **The Federal Experience.**

Federal civil procedure permits broad pre-trial discovery. (Fed. R. Civ. P. 26-37; 4 Moore, *Federal Practice* §§26.02-.03 (1950).) The fallacy of the arguments against grand jury disclosure “has been starkly exposed through the extensive and analogous experience in civil causes where liberal discovery has been al-

lowed. . . . Indeed, that experience has suggested that liberal discovery, far from abetting, actually deters perjury and fabrication.” (Brennan, *Remarks On Discovery*, 33 F.R.D. 56, 62). Thus the arguments against grand jury secrecy cannot rest on unfavorable experience with civil discovery. And they certainly cannot be based on experience with disclosure of grand jury minutes in federal criminal cases. There has never been any such experience.

“[H]ow can we be so positive criminal discovery will produce perjured defenses when we have in this country virtually shut the door to all such discovery? That alleged experience . . . is simply non-existent. So if it be true, as unfortunately it is, that crime is on the rise in America, we surely can’t blame that regrettable fact on the operation of criminal discovery procedures.” (Ibid).

It is therefore plain that arguments against grand jury disclosure cannot be sustained by reference to experience with discovery in federal courts. On the contrary, the excellent results obtained from civil discovery make a convincing case for disclosure.

#### **The States’ Experience.**

Recent state decisions mark an unmistakable trend in the direction of liberal pre-trial inspection of grand jury minutes in the discretion of the trial court. (*E.g.*, *State v. Faux*, 9 Utah 2d 350, 345 P. 2d 186 (1959) [defendant permitted to examine grand jury testimony before trial so he could determine at trial whether there was any inconsistency in the testimony]; *State ex rel. Clagett v. James*, 327 S.W. 2d 278 (Mo. 1959) [de-



fendant allowed pre-trial inspection of grand jury testimony of witnesses who would testify at trial]; *State v. Moffa*, 36 N.J. 219, 176 A. 2d 1 (1961) [defendant permitted pre-trial inspection of grand jury testimony to prepare his defense]). In *State v. Faux*, *supra*, defendant was indicted by the grand jury for misconduct in office. A Utah statute provided, in language similar to that in Criminal Rule 6(e), that the transcript could be exhibited to no one other than the County Clerk and the District Attorney "except upon written order of the court duly made after hearing. . . ." (Utah Code Ann. §77-19-9 (1953)). In a well reasoned opinion the Utah Supreme Court held that the trial court did not abuse its discretion by permitting defendant's counsel to examine the transcript before trial. Thus the court did not have to decide whether defendant was entitled to pretrial inspection as a matter of right. But the opinion indicates that if the question had been presented the court would have held that after indictment the defendant has an absolute right to the transcript. After reviewing the five traditional reasons for maintaining secrecy, the court said, "It will be noted that after the indictment is returned and an accused is arrested, the reasons for secrecy have largely been spent." (345 P. 2d at 187.) The court recognized that deliberations of the grand jury may be protected by secrecy, but,

"While secrecy may be justified at certain stages of the proceedings for the purposes hereinabove indicated, all fair-minded persons will concede that ultimately the full truth should be revealed to the court and jury. In such instance the truism should be recognized that the truth should have nothing to fear from light." (345 P. 2d at 188-89.)



The court then pointed out that in a preliminary hearing procedure, unlike a grand jury investigation, the accused is afforded an opportunity to adequately prepare for trial because he knows what the witness against him testified to. The court concluded:

“Our law has come a long way since the days of the English Star Chamber when men were tried without being present and condemned on testimony of witnesses whom they were never permitted to see. If anyone is under the illusion that in this country one may be condemned for alleged crime upon evidence taken in his absence and kept secret from him, it is heartening to be able to point out that such is not the state of our law. Fortunately such proceedings are not now regarded as among the brightest chapters in the development of our system of justice.” (345 P. 2d at 189).

Many states only occasionally employ the grand jury to initiate criminal prosecutions. Long and satisfactory experience by states that use the preliminary hearing procedure completely refutes the arguments of those who insist that secrecy is necessary to “protect the accused,” or to “protect witnesses from the accused.” According to a 1931 survey, nineteen states permitted felony prosecutions to be initiated by information or indictment. In the majority of these states most prosecutions were initiated by information. (Morse, *Survey of the Grand Jury System*, 10 Ore. L. Rev. 101, 121-23 (1931)). In Kansas and Wyoming, for example, the grand jury is seldom used. In Kansas it is used only by a petition signed by taxpayers and addressed by the court (Kan. Gen. Stat. Ann. §62.901 (1949)).

In Wyoming it is used only upon order of a district court (Wyo. Stat. Ann. §7-92 (1957)). See Calkins, *Grand Jury Secrecy*, 63 Mich. L. Rev. 455, 469 n. 51 (1965)). Four states have provided by statute that, after an indictment is returned, the defendant must be furnished with a copy of the grand jury minutes in advance of trial (See Cal. Pen. Code §938.1; Iowa Code §772.4 (1962); Ky. Crim. Code §110 (Baldwin 1953); Minn. Stat. Ann. §628.04 (1947)). In California the great majority of prosecutions are started by filing an information. However, when the grand jury is used the defendant must be provided with a copy of the transcript of testimony before trial. This procedure has been mandatory since 1927 (Cal. Stat. 1927, ch. 684, §2, amending Cal. Pen. Code §925 (now §938.1), see Cal. Stat. 1959, ch. 501, §2, as amended Cal. Stat. 1963, ch. 687 §1). There is no evidence that giving a defendant the absolute right to the grand jury transcript before trial has had an adverse effect on the fair and free presentation of evidence. On the contrary, the grand jury has remained a vital and effective instrument of the California judicial system (Kennedy, *Historical & Legal Aspects Of The California Grand Jury System*, 43 Calif. L. Rev. 251, 267 (1955)).

Secrecy need not be entirely abolished to assure the defendant a fair trial by allowing him to adequately prepare his defense. In California ordinary sessions of the grand jury are conducted in private. Unauthorized persons are not permitted to be present (Cal. Pen. Code §939 (1967 supp.)). Deliberations and voting are done privately. A transcript of the testimony received is made only if an indictment is returned (Cal. Pen. Code §938.1 (1967 supp.)). Thus the privacy of the person

who is not indicted is protected. If a defendant who has been indicted is not in custody, neither the fact of the indictment nor the contents of the transcript may be disclosed (Cal. Pen. Code §§924, 938.1 (1967 supp.)). Thus, secrecy is insured when secrecy is necessary. When the reasons for secrecy disappear, disclosure is permitted.

### Conclusion.

The inescapable conclusion to be drawn from this review of the experience of jurisdictions that permit disclosure of grand jury minutes is that the reasons advanced for maintaining secrecy are based on false premises. It will not be denied that an accused can better prepare for trial if he can use the grand jury transcript. His trial is unfair if he is unable to adequately prepare for it. It is unfair to allow the prosecution to use the transcript and to deny that privilege to the accused. A defendant who does not receive a fair trial is denied due process of law (*Moore v. Dempsey*, 261 U.S. 86, 43 S. Ct. 265, 67 L. ed. 543 (1923); *Palko v. Connecticut*, 302 U.S. 319, 58 S. Ct. 149, 82 L. ed. 288 (1937)). Appellant was deprived of a vital source of evidence and information essential to his defense. Due process is violated when the accused is deprived of evidence favorable to his defense (*Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. ed. 2d 215 (1963)).

“The Constitution does not discriminate between evidence obtained by the state from an extrajudicial statement of a witness and testimony given by that same witness before a grand jury. The life or liberty of an accused is no less important when the source of the favorable evidence is a

grand jury hearing. Therefore, a statute that would stand as an obstruction to such disclosure . . . must fall before the Constitutional requirements of due process.” (Calkins, *Grand Jury Secrecy*, 63 Mich. L. Rev. 455, 489 (1965)).

To the extent that Criminal Rule 6(e) permitted the trial court to refuse appellant’s request for permission to examine the grand jury minutes before trial, that statute, and the court’s refusal, violated appellant’s right to a fair trial under the Due Process Clause of the Fifth Amendment to the Constitution. A federal constitutional error compels reversal on appeal unless the government can prove that it was harmless beyond a reasonable doubt (*Chapman v. California*, .... U.S. ...., .... S. Ct. ...., 17 L. ed. 2d 705, 710-711 (1967)). Without the grand jury transcript appellant was unable adequately to prepare to defend against the testimony of dozens of witnesses given in a trial that lasted three months and filled over 15,000 pages of trial transcript. The constitutional error committed by depriving appellant of the opportunity to adequately prepare his defense was not harmless. The judgment of conviction should be reversed.

BALL, HUNT, HART & BROWN,  
CLARENCE S. HUNT,  
FREDERIC G. MARKS,  
JOSEPH D. MULLENDER,  
ANTHONY MURRAY,

*Attorneys for Appellant.*

### **Certificate.**

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

CLARENCE S. HUNT





## **APPENDIX A.**

**Complaints Reviewed by Attorney Finell.**



Santa Monica, Calif.,  
Jan 14 61.

ocel  
Pr.  
eanch Dev.Co,  
lyHills Cal.

31;  
With reference to Contract#IIIO Ranch # F.33\*13 Jan 4 61  
is Arthur and not Alfred)let me say this.  
My wife and I visited the ranch in June of 61and needless  
we were greatly dissapointed. We were led to believe from  
the pictures that is was a green lush area and we found  
mostly dry sage brush rocky road desolate looking prairie  
We also found that water is not too plentifuland that  
for same might be a rather expensive operation at best.  
That the variation in temperatures was much greater than  
told.  
In view of all the above if the land is as good as you claim  
then there should be no difficulty for you to re sellit  
it is not as good as you claimthen we should have our money  
back to us in full.

Very Truly Yours

*Arthur Alfson*  
Arthur Alfson  
951 2th St.,

Santa Monica  
California.







JAN 15 1962

W. S. Besner  
14818 Fonthill  
Hawthorne, Calif.

January 11, 1962

Amle Ranch Development Corp.  
11 Wilshire Boulevard  
Beverly Hills, Calif.

Dear Sirs:

I recently read an article in the newspaper that said  
your firm would refund all money paid on land bought at  
Amle Ranch if the buyer was dissatisfied. We are among the  
dissatisfied buyers. We feel that pictures we were shown  
 misrepresented the land we bought. My wife and I drove to  
Amle Ranch this summer to see our land and were very dis-  
appointed. It was nothing like we had been led to believe.  
It is true that you are refunding all money paid by dis-  
satisfied buyers, we would appreciate it if you would refund  
our, providing the refund includes all interest paid.  
Thank you

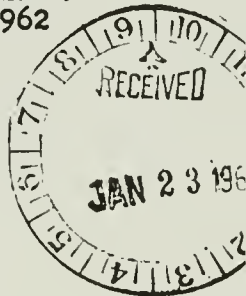
Respectfully Yours,  
W. S. Besner

Contract No. G-964



272

1106 N. Concord St.  
Santa Ana, Calif.  
January 19, 1962



Ranch Development Corp.  
Mr. G. L. Weller  
Wlshire Blvd.  
Hills, Calif.

een,  
Wherewith give notice of rescision of our contracts  
r 2727 and 2728 dated October 25, 1961 for the purchase  
a estate parcels K-1-45 and K-1-44 respectively in Section  
Gmble Ranch, Elko County, Nevada.

The initiation of this rescision is specifically based upon  
hrough conviction that the present status and immediate  
development and industrialization of the town and surrounding  
o Montello, Nevada have been grossly and fraudulently  
presented by the seller.

We were briefly shown copies of the Declaration of Restrictions  
h State of California Subdivision Public Report regarding this  
ry and, after our signing of the contracts to purchase, both  
es together with our payment record receipt book were retained  
e seller without our knowledge and against our will.

We were specifically made to feel by the seller that we could  
to "reap a big harvest" on our investment in a short time.

Again specifically, the seller claimed as evidence of the  
ative heavy industrialization of the area, the location there  
large distribution center by Sears Roebuck & Co. To our  
ece this claim has no basis in fact.

Need we are thoroughly convinced that any development of  
re investment -wise either at present or in the foreseeable  
will be only to the extent artificially and superficially  
e by the seller.

We therefor rescind these contracts to purchase and demand  
and of all moneys applied thereto.

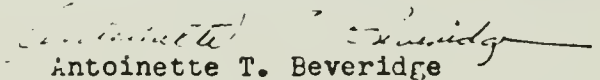
All pertinent documents concerning this purchase will be  
re upon your acknowledgement of this rescision and our  
of money due.

Yours Truly,

Atty. General,  
State of Calif.

Assemblyman  
Lester McMillan

  
Warren R. Beveridge

  
Antoinette T. Beveridge



Jan 12, 12

To Whom it may concern.

I am a property owner &  
I am not pleased with  
it & have purchased. I think  
was created. I would like  
it my cash back, that  
property is no good.

Jack K. Spill







Edward K. Ingraham  
3909 West 148th St.  
Hawthorne , Calif.

Jan. 18th. 1962

Robert McDonald, Atty.  
Westates Land Development Corp.  
Ranch Dev. Co.  
Milshire Blvd.  
Hills , Calif.

Dear Sir;

I read an article in the paper, in regard to your meeting with the State Realty Commission. In this article you stated, that the money paid toward the purchase would be returned, if the person felt they were dealt with unfairly, and my wife both fall in that category. The "Movies", and last July we took a trip to see the, "Land". Needless to say, that after seeing it we felt worse. "No trees, just no nothing, but there was; "land", and the man showed us that he thought was our 10 acres, but he couldn't be sure. Montello, is not a thriving town, and if you want my opinion, anyone concerned, would be better off if it was, "burned down, and then".

The only good thing I can say, is , the "Food was good, and the bar was nice, and the accomadation's at the "Motel", were comfortable. The road was being worked on, and was in very bad condition, and we got stuck and the man running the grader pushed us out, but banged up the back of our car. We were so glad to get away from there that we didn't do any complaining, but just keep on going, with a grateful wave thanks, for his effort.

My book say's we have paid \$440.00 on contract G-884 Ranch No.

I'll look for your check.

Thanks for your consideration,

I remain ,

Yours Sincerely;

Edward K. Ingraham

*Edward K. Ingraham*





Jamble Ranch (Associated),  
Tonight as my husband &  
were watching the news on  
television, we were shocked at  
the words that came over the  
waves. Jamble Ranch is a  
scam! We immediately called  
an attorney and he advised  
us to write and demand our  
full reimbursements of payments  
and interest immediately or  
there will definitely be a  
court order against you and we  
will not stop until we get our  
full amount, which according  
to our records is \$355<sup>50</sup>.

# H-11-32  
# 1916

Respectfully,  
Mrs Mrs Henry Kling





HEAVY  
EAST COAST  
1000



PRAY  
FOR  
PEACE



Amble Ranch  
9412 Wilshire Blvd.  
Beverly Hills, Calif



January 12, 1962  
Lamb Ranch Development Corp. S.D.

Dear Sirs:

We visited the Lamb Ranch last  
year and were very disappointed in  
what we found. It seems that others  
were also disappointed in the  
property. We too had been told that  
a casino would be established nearby  
and a planned city would be built.

A number of newspaper clippings  
were sent to me by my brother in  
Nevada with his estimate of the true  
value of the land. Enclosed is a  
clipping from the San Diego Tribune  
from January 12, 1962 edition. It  
states that Robert McDonald, attorney for  
Pacific Westgate Land Development Co.  
told the Nevada Real Estate Commission  
that the corporation would refund money  
to dissatisfied buyers. The Nevada Paper  
gave the new name as Pacific Westgate and  
Pacific Western State. It seems the firm  
name was changed about two months ago.  
We have been sending our payments  
to Lamb Ranch Development Corp. and



The name has not been changed on the last return envelope sent to us.

The establishment of several prominent industries in the area seems to be far fetched after looking at the land.

We would like to have our money refunded that was paid on the following piece of land.

tract # 1256

ach # C-7-62

total payments of \$415.00

Feb. 8-61 - 90

Feb. 28-61 - 25

Mar. 30-61 - 25

May 3-61 - 25

May 26-61 - 25

June 20-61 - 25

June 18-61 - 25

July 31-61 - 25

Sept. 5-61 - 25

Oct. 27-61 - 25

Nov. 24-61 - 25

Dec. 2-61 - 25

Dec. 29-61 - 25

Dec. 27-61 - 25

Will you please let us know as soon as possible the refund on this piece of land.

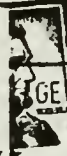
Very Truly Hugh E. Leonard RJ 4-Bx 3220  
Elvis E. Leonard. Vista, Calif.

EXHIBIT 3-362





14 Jan. 1962



Westgate Land Development  
Wilshire Blvd.

Hills, Calif.

Subject: Gamble Ranch

We respectfully demand a  
refund on Contract No.  
for the sum of \$315.00.

As the land was misrepresented  
as fertile, rich land  
with trees and a never  
ending supply of water.

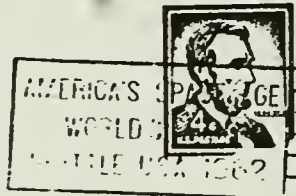
Your check by return  
will be very much  
appreciated.

Very sincerely,  
Mrs. Eleanor Patterson

1137 Osage  
Chula Vista, Calif.



187 Osage  
Vista, Calif



See Westgate Land Dev Co  
9412 Wilshire Blvd.  
Beverly Hills, Calif





Jan. 12, 1962

Sir:

Upon information received from the Nevada Real Estate Commissioner, we understand that our money will be refunded for the purchase of Ranch E-21-7, contract no. G-682.

I, James R. Rossi and Clarence C. Smith, both had been misled by Jack Savage, of San Jose sales representative of Gamble Ranch. He showed us green pastures with abundance of cattle roaming and lots of water. Upon investigation we found that what we had purchased was nothing like what was told to us and what was shown to us.

Hoping to hear from you soon

I remain

Yours truly,

*James R. Rossi*

*Clarence C. Smith*

*James Rossi  
859 So. Monroe St.  
San Jose, Calif.*

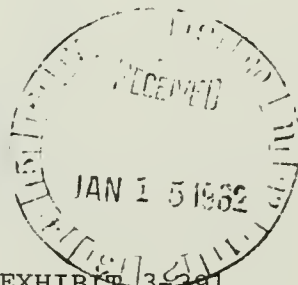


EXHIBIT 3-391

Page A-12



Norval Rossi  
1899 So. Monroe St  
San Jose, Calif.

Samuel Ranch Development Corp  
9412 Melrose Blvd.  
Beverly Hills, Calif.

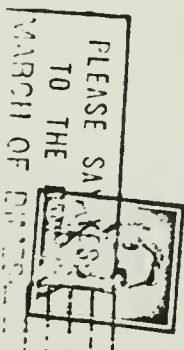


EXHIBIT 3-391

Page A-13



Jan. 15, 1962  
San Diego, Calif.



edie Westgate Land Development Corp.  
12 Wilshire Blvd.  
vely Hills, Calif.

Attention: Mr. Robert McDonald

Mr. McDonald,

After reading the article in the San Diego  
Herald-Examiner Newspaper, concerning the misrepresented  
property on the Gamble Ranch, I believe I fall in  
line.

I feel misled, as at the time of purchase we  
were shown pictures and pamphlets of lush  
land. As I understand, it is mostly sage-  
brush with no water. This property is to far  
from the conveniences I was led to believe  
it had.

I would like my money back as I am very dis-  
satisfied.

The ranch number is D 13-118, and my contract  
number is 244.

I expect to hear from you soon.

Sincerely,  
*Richard E. Senn Jr.*  
Richard E. Senn Jr.  
5163 Aberdeen St.  
San Diego, Calif.

has





Richard E. Senn Jr.  
5163 Aberdeen St.  
San Diego 17, Calif.



Pacific Westgate Land Development Corp.

9412 Wilshire Blvd.

Beverly Hills, California

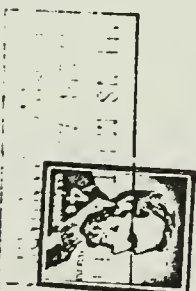


EXHIBIT 3-393

Page A-15

ATTENTION: Mr. Robert McDonald



8934 Eldorado Parkway  
El Cajon, California  
January 14, 1962

Dear Sir;

I understand that anyone who feels the property at Gamble Ranch was unfairly represented is able to get his money returned. I definitely feel that the property was misrepresented. It was presented as being right at the edge near to the pictures shown of deep grass and plenty of water. I was told by the salesman that the water table was only 12 feet deep and now I hear from other salesmen that it is from 200 to 300 feet deep. I saw the property this summer and were disappointed to see that it is desert, no water and no trees. Please reply as soon as possible.

Yours truly,

RE - E-27-12

PC - 1087

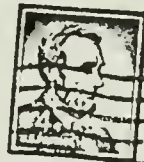
*Impress L R Snyder*





AFTER FIVE DAYS RETURN TO

4712 1st St.  
3145 Wilshire Boulevard  
Beverly Hills, Calif.



*James E. Rancie Development Corp.,  
9412 Wilshire Boulevard,  
Beverly Hills,  
California.*



January 15 1962

able Ranch Development Corp.  
42 Wilshire Blvd.  
eerly Hills, Calif.

etlemen:

According to newspaper articles, Mr. Robert McDonald,  
torney for Pacific Westgate Land Development Corp.  
tted "Californians who think they were bilked in buying  
able Ranch land in Nevada sight unseen can have their  
ey back.....the money, regardless of the amount, ~~xxxxxx~~  
~~xxxxxx~~ that they have paid, will be refunded in  
ul immediately."

eel that the property has been grossly misrepresented.  
ends of mine who have visited it have told me that it is  
as represented by your literature or salesman.

n enclosing my contract payment book 1868, showing that  
ave paid \$345.50 ; also contract book 1869 showing  
ment of \$260.00  
\$605.50 total. I hereby request the return of  
payments in full.

I've not yet written to the Nevada Real Estate  
omission about this, and shall await your reply before  
oing.

Sincerely yours,

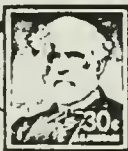
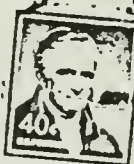
*R. M. Stockton*

Robert M. Stockton  
1020 So. Ditmar St.  
Oceanside, Calif.





M. Stockton  
4 So. Ditmer St.  
Bayside, Calif.



REGISTERED  
RETURN RECEIPT REQUESTED

GAMBLE RANCH Development Corporation

9412 WILSHIRE BOULEVARD  
BEVERLY HILLS  
CALIFORNIA





Mrs Eklamay Suehnholz  
4807-E-Florence Ave,  
Bell, Calif.,.

January 9th, 1961

Refer to; Parcel, N.W. $\frac{1}{4}$  - S.E. $\frac{1}{4}$  - S.W. $\frac{1}{4}$   
of section 33 Township 39n  
Range 69E. In Gambela  
Ranch, Nevada.

Dolores A. Hoffman  
Authorized Agent

F.L. Gillhouse  
Salesman.

Dear Madam;

On or about November 2nd 1960 I called your Office by the prescribed Telephone number given on the Television Advertisement. Then on November the fourth your Salesman namely, F.L. Gillhouse called at my home, at the above mentioned address. He showed my husband and three other guests at my home, some Colored slides, and a recorded voice on same, also he showed them several picture advertisements and made several statements regarding this project and he made statements before my husband and the witnesses as follows. That the water was shallow at fifty to one hundred feet, all excess roads to the property were being developed therein without cost to us, the plots were all marked and surveyed, That a large new Gambling casino was planned for the near future, And he showed a letter with the Governors signature thereon, stating that the land was lush grass land, showing pictures of cows grazing thereon, also that there would be electricity available, and that natural Gas was bordering the property. Now during the conversation with Mr Gillhouse, my husband said that he would first like to visit the site, and make sure of satisfaction, but he then stated, that he had a special piece of property that was bordering on a main road leading out of the new site of the township, and he added he would make me a special bargain on this parcel if I would get right away, and he went to phone to make sure that the parcel was still available, since we were in the Beauty Parlor business and met so many people he wanted us to have this special parcel.

So after he finished his phone conversation, and stated that the parcel was available, he signed the contract paying \$125.00 down with payments to start Dec, 16th, 1960 at the rate of \$31.50 plus interest, I made four monthly payments and then on April 5th, 1961 I paid the balance of \$2,205.48 paying the property off in full.

Then in June 1961 I took a vacation for the purpose of checking over the property, I had a twenty two foot trailer hauled up there we arrived at the Headquarters all four of us. Then I was introduced to Davidson, whom was your representative on the project. I had one man with the man that hauled the trailer up there and they arrived up there the day before us, and he was abuilding contractor and builder with letting out land, and he helped Mr Davidson to lay two of the corner pieces in, I then asked Mr Davidson questions, I said how would I get into the property? he said you would have to cut your own road into the property, I also found out that the property was misrepresented to me, and was not the plot on the main road leading out from the proposed townsite, Then Mr Davidson stated that I could be lucky to reach water in less than three hundred and fifty feet, the land was not as the sales man described, it was covered with sage brush, he also stated,

continued next page.



continued from page one.  
In order to drill a well for water it would cost me from \$3000.00 to \$5000.00 and this would not include the motor as the Electricity was not available. Then there was the additional cost of clearing the land of the same brush. He also stated that he did not know of any new house being built here on the project. From this information I returned from Mr Davidson, and finding all the misrepresentations made by the Salesman Mr. F.L. Gillhouse, I became very much upset and I called him to him, he then became very evasive, and stepped into his Station Wagon and rode off. We were left standing there all by ourselves, he returned shortly, and I asked him would he be kind enough to show me a place where I could leave my House Trailer, and he would be kind enough to sell same for me for I did not want the hassle of hauling same back to Bell, California, and that I would be willing to pay him ten percent for the sale price, he said that he would lead to, and then we left for home. Then we did not receive any word from him for one month and I sent a man out there to haul my trailer back to Bell, Calif., when I arrive there with the hauling I found my trailer inside was wrecked, it cost me \$100.00 for repairs and replacement thereto.

I want to say here, that after I returned, I called your Office and Mr. F.L. Gillhouse to come to my house as I wished to see him. He told me he would be here in a few days, that was about six weeks ago, and he has not shown here yet, this I also call bad faith. In lieu of all the misrepresentations he made on this property, due to the statement in the Los Angeles Times and also our Local Paper, "The Huntington Park Signal, I am hereby requesting the refund of the full purchase price in good faith. I am asking you will take care of this matter promptly, with the heads of the Land Development Organization, in accordance with the Statements of the Attorneys for the Organization, of which I am keeping copies of one, with the names of same therein, and I assure you I will not bring this over no six months, I will then go further with the matter.

Very truly yours

*Ellamay Suehnholz*

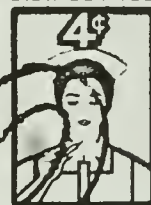




1000012  
7-1-1961  
1. California  
1000012



U.S. POSTAGE



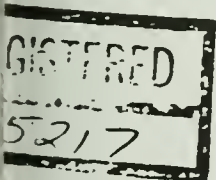
NURSING

GAMBLE RANCH Development Corp.

9412 WILSHIRE BOULEVARD

BEVERLY HILLS

CALIFORNIA





**APPENDIX B.**

**Complaints Reviewed by Attorney Ross.**



2479 Elcom Ave,  
Costa Mesa, Calif.  
Aug. 6, 1962

Gamble Ranch  
41 Wilshire Blvd.  
Overly Hills, Calif.

RE: A.W.Ayers  
Ranch D-3-5  
Contract 1411

Mr. John Carly:

Sir,

On the 19th. day of February, 1961, fraudulent, false  
statements were made to induce me to purchase a parcel  
of Gamble Ranch, known as D-3-5, under contract #1411. Through  
neglect, your advertizing, and publication of "Gamble Ranch  
Note", I was made to believe this was good ranch and home  
land. ~~On receipt of~~ inspection I find it arid and barren wasteland.  
Therefore demand refund of four thousand seven hundred ninety  
dollars and ten cents. ( \$4,792.10 ).

Refund \$4,990.00  
Amount paid 112.56

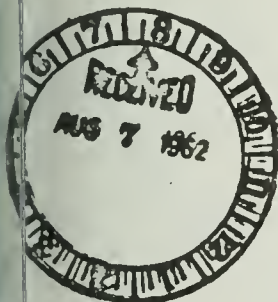
Amount on payoff \$ 5,102.56  
310.46

Total \$ 4,792.10

On advice of counsel, I give you this opportunity  
for restitution. An immediate reply is expected, or legal  
action will be taken.

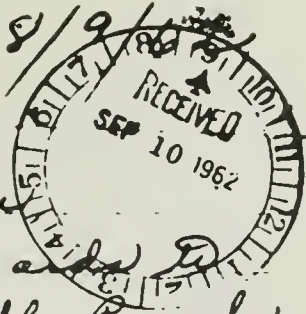
Respectfully

*A.W.Ayers*  
A.W.Ayers









Dear Mrs. Jourd'art

In regards to

the land at Humble Ranch  
we are sorry to tell you  
how bitterly disappointed  
we were. When we took  
time & money to drive up  
to see it we saw how mis-  
represented it was to us.

First of all it was at the  
base of a mountain, no roads  
& completely inaccessible.

We are too advanced in  
years to wait for any dev-  
elopment that could pos-  
sibly help us in any way.  
Had we known we would  
certainly never invested  
in anything of that kind.



It also took our meager  
savings to buy into it -

We hope you will be  
able to refund our money.  
I am sorry the land was  
advertised in such a  
misleading way.

Hoping to hear from  
you as soon as possible

Respectfully,

Em & Mrs. J. J. Morgan.  
6631 Salt Lake Ave.  
Des. City, #66

Contract # 3204

Ranch # D-13-59





August 2, 1962  
1140 Dewey Avenue  
Los Angeles 6, Calif.

Gamble Ranch Development Corp.  
9412 Wilshire Blvd.  
Beverly Hills, California

Dear Sirs:

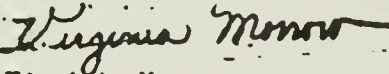
Enclosed is my payment book and check for \$15.00.

~~Since your company can no longer sell Gamble Ranch parcels~~  
in California due to misrepresentation in advertising, I  
would like a letter from you stating your plans for the  
California buyers who have contracts with you.

It is one thing to buy land from a California corporation  
who has expansion plans for Nevada land for California  
buyers, and quite another when the corporation is prevented  
from further selling in California.

I will appreciate an immediate explanation from you.

Very truly yours,

  
Virginia Morrow

cc: Harold L. Myers, Atty.  
215 W. 5th Street  
Los Angeles, California



C. L. Newton  
501 West Lathan  
Hemet, Calif.

Ranch Development Corp.

Highway Blvd  
Yuma, Calif.

Dear Sirs;

I have been paying on 10 acres of land purchased from  
After seeing the land I feel you have greatly overstated its  
stand advantages. Water is unavailable, also power. Both would  
be considerable to acquire. The land looks like it wouldn't grow

At the least I am dissatisfied with the purchase and feel  
money should be refunded.

As I have paid \$415.00 into the land, including interest  
refund.

I await your immediate answer. I am inclosing a self addressed  
envelope for your convenience.

Sincerely.

C. L. Newton

Contract #2549

Ranch K-1-16





GORDON & WEINBERG

PA. GORDON  
ONAD D. WEINBERG  
EUSE P. COULTER  
ERAD N. GORDON  
ARCE E. SHELTON

2323 WEST THIRD STREET  
LOS ANGELES 57, CALIFORNIA  
DUNHIRE 8-2323

November 19, 1962

NOV 20 1962

Mr. Ranch Investments  
5 Brighton Way  
Beverly Hills, California

Re: Mr. & Mrs. Harry Novick  
Contract G461  
Branch No. D-3-12

Attention:

We are to advise you that we have now been consulted by Mr. and Mrs. Harry Novick regarding their purchase of a forty acre section of the Gamble Ranch, on June 25, 1960. After reviewing this matter thoroughly, with both the State Real Estate Commission and certain titles in and around Elko, Nevada, we have been instructed by Mr. & Mrs. Novick to advise you that they hereby elect to rescind the contract made by your company, as seller, and the Novicks as buyer, in writing, dated June 25, 1960, on the ground of fraud, consisting of your company's representation regarding the condition of said property.

Statements, both written and oral, the Novicks were led to believe there was an adequate water supply available, whereas water was actually to be 200 feet down in some spots; that there were access roads completed or about to be completed, when in fact, no such roads existed to their property; that there was electricity available, when in fact, no such power existed; and that the said land was capable of growing crops such as alfalfa, pasture, small grains, corn, deciduous trees and potatoes when, in fact, the soil is unable to support the growth of these crops.

Wherefore, we are hereby empowered by Mr. and Mrs. Novick to restore to you all things of value relating to this transaction and your restoration to the Novicks of their total purchase price to the sum of Seventeen Hundred Seventy-five Dollars (\$1775) less the fee paid to you.

Executed November 19, 1962

GORDON & WEINBERG

By Aaron E. Sheldon  
Aaron E. Sheldon  
Attorneys for Mr. & Mrs. Novick

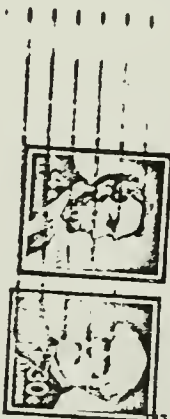
EXHIBIT  
Page B-





*For Office of*

GORDON & WEINBERG  
2323 WEST THIRD STREET  
LOS ANGELES 57, CALIFORNIA



RETURN  
RECEIPT REQUESTED

**CERTIFIED**  
No. 623631

Gamble Ranch Investments  
9615 Brighton Way  
Beverly Hills, California



# LIVE-WIRE LINDSKOG, INC.

REAL ESTATE AND INSURANCE

Post Office Box 1349

910 IRWIN STREET

Telephone GLENwood 4-0832

SAN RAFAEL, CALIFORNIA

Sept. 17 1962

P. O. Box 296

188 E. Blithedale Ave.

MILL VALLEY - DUnlap 8-7331

Pacific Weststates Land Dev. Corp.  
9615 Brighton Way  
Beverly Hill, Calif.

#1525

Dear Sirs:

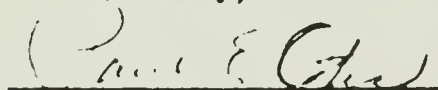
Nearly two months ago I wrote you regarding my C-5 property and todate I have received no answer.

To review my case, after I purchased this property, I went to the ranch to see this 0 acres. I was disappointed and feel there has been misrepresentation by the salesman and our literature. For example claims on water are about one quarter of the distance of actual.

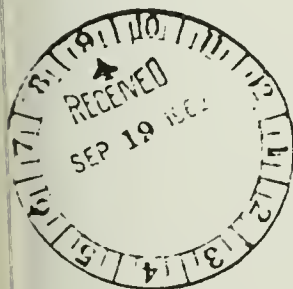
I wish to be refunded for this investment. Totade I have paid \$365.30 to principal and \$149.70 to interest, balance owing \$1624.70.

This is the second letter so I am asking you again for an answer before I proceed further. Please advise me promptly on this matter.

Sincerely,



Paul E. Otis  
25 Wiltshire St.  
Larkspur, Calif.





10/17/62  
C 885 11/8/9/62 <sup>10/17/62</sup> <sup>Felger and told</sup>  
Glover  
f  
Dear Sir: I reply to your letter of Oct 4th.  
received by me 10/8/62.  
Some time back I wrote and asked  
for my money to be refunded, but  
was refused.

I was misrepresented on this land as  
being lush, when it is nothing but  
sand and sagebrush. When you were  
asked by the Real Estate Commission to  
quit and refrain from any more  
land sales in Nevada, I could not  
be making any more payments so  
I have now turned it over to our  
attorney and you will hear from him.





a few days.

respectfully

Henry Pearson

address → 3830 Loma Lane

Baldwin Park  
Calif.

Ranch No. D-9-16



August 29, 1962

Whom it may concern

Dear Sir

I am one of the buyers on  
Gamb Ranch. I had intentions to go  
up & see it in August & got as far as  
Boson City, Utah. What I heard there made me  
curious. I bought this ranch with the  
express purpose of Farming it for me &  
my Son. I found out now this ground  
is nothing but alkali & Talcchi (hard pa-  
sture) where you can't dig it up & nothing  
will grow.

The man who sold it to me  
openly stated they were growing alfalfa  
there, also you had plenty of water  
(which you have not) & you were pulling  
it pipes through. I now find you  
even dig a well without permission  
on the state. The movies they showed  
me had lots of grass & trees. I stated  
I would only take it if it had trees on  
it because I had sense enough to realize



that trees grow only where water is.  
Now I hear those movies were probably  
taken around upper Elko County - not on  
the land at all - to me this is false  
representation. I also went in to see Mr.  
McDonald in Reno he informed me he  
was no longer attorney for Gamble Ranch  
the man I bought the property from is  
no longer with you, in all the news-  
papers you sent (I've kept them all) it stated  
you were growing fruit trees & all types  
of vegetation.

I want to know from you if  
the land is alkali & Kalechi then I either  
want another piece of ground that is  
not land, or refund my money

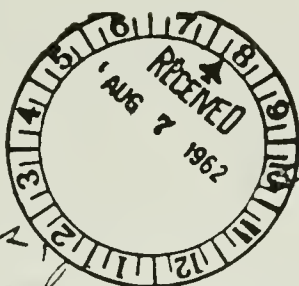
I remain  
Mrs. Margaret Sheets





As regards the ten acres F-27-7  
we was buying from the Gamble  
Truck, it was misrepresented  
to us, we was told we was only  
1/2 <sup>down</sup> from Water, and we understand  
it is being investigated and  
is not any of it what it is  
supposed to be, and that we  
are protected, so we are keeping  
contract till they can prove  
that it is what it has been  
presented to be. Sincerely  
Mr & Mrs Andrew Silva





Aug. 3<sup>rd</sup>

Dear Sirs  
After reading newspapers  
likping that you had been  
losed down and was a  
braudlent co. and had  
misrepresented I don't feel  
can through any more  
money after bad. Thin  
after deciding to go ahead  
ending that \$100 just a  
month ago because was  
little a head and might  
not be later. Should have  
my head fixed.  
Looks like to me you  
could be forced to return  
the money.

L H Thompson  
3925 Redwood Highway  
Santa Rosa, Calif.



Case No. 33496-(EC) Crim.

U.S.A. vs Benaron, etal

Gov't Exhibit 3-547

Date MAY 10 1986. 3-547 Identification

Date MAY 10 1986. 3-547 In Evidence

Clerk, U.S. District Court, Sou. Dist. of Calif.

Wayne E. Payne Deputy Clerk

Wayne E. Payne

this in with buyers  
glan deal file.

old be no more problem.  
give  
10-1-62

Case No.

VS

EXHIBIT 3-547

Date

No

Date

No

Clerk, U. S. District Court, Sou. Dist. of Calif.

Death 7/23  
Office  
of Calif





September 28, 1962

G. Weller  
Special Collection  
Eighton Way  
Hill, California

M. Weller:

well aware I have not made payments since August, as I am very dis-  
satisfied the way things are handled.

received this piece of land in good faith. The representative told  
me in five years or so the value of this land would be worth be-  
tween two and five thousand dollars an acre. Who could pass up something  
like that, I ask you?. There has been too much written in the Los Angeles  
and Nevada papers against people buying such worthless land and I am  
one of the suckers. I continued to make payments until I received my  
statement and found out the valuation of the land purchased is only  
a total of \$50.00. I immediately wrote The Gamble Ranch Investment  
Company, 9412 Wilshire Blvd. telling them, too much has been written about  
worthless land and I wanted my money returned, as promised, if not  
satisfied, or a good explanation why I shouldn't continue to make pay-  
ments. I also told them I would discontinue payment until I heard from  
them. To date, I have not had one little note from them.

I am in a position to make full payment, but still want an explanation or  
answer to my questions. If I do not receive some sort of answer, or  
action immediately, will turn this matter over to my attorney.

I do not care for anything unpleasant and this is an unpleasant situation  
I want you to answer this letter and clear up statements, will be glad  
to hear from you, otherwise I will set here and do absolutely nothing.  
People do owe me an explanation of some kind.

Sincerely,

Margie E. Winter  
Margie E. Winter

2235K

Weller phoned 10-1-62  
made her happy -  
will bring payments current



## **APPENDIX C.**

**Miscellaneous Complaints Sent to Gamble Ranch Co.  
and Found in Company Files.**



1435 So. Stanislaus,  
Stockton, California,  
November 9, 1962

*Lodge  
checked  
11-11-62  
H.P.*

Gamble Ranch Development Corp.  
965 Brighton Way,  
Berkeley Hills, Cal.

Dear Sir:

I have just returned from a visit to the town of Montello, Nevada,  
to see about the property that I had purchased and I feel that I have  
been a victim of a first grade fraud. This is a misrepresentation of your  
advertisement and brochures that were shown to me by your salesman, who  
magnified this transaction out of proportion with distorting facts,  
pamphlets, and movies.  
So, after viewing the property and talking to the local residences of  
Montello and Wells, Nevada concerning my investment I am taking legal action  
in force, as I do not intend to continue with this farce any further.  
I have had a talk with Mr. Wynne A. Savage, Real Estate Commissioner at  
Sacramento, Cal. and was told that all land sales of the Gamble Ranch  
ever stopped in California, due to the misrepresentation of facts.  
I have been advised to contract my lawyer, Mr. Bradford Jeffrys of the law  
firm, Jeffrys and Jeffrys, Barbour, and Gibson or Mr. Joseph O. Mc Daniels,  
District Attorney of Elko County, Nevada, who has handled several of these  
cases concerning this property. So, if I do not receive my money that was  
paid on this property by return mail I will be forced to start legal  
proceedings immediately, against the Gamble Ranch and all parties involved.

Contract No. 3343 and 3345:

Marv A. Gimenez

*Marv A. Gimenez*





October 8th 1962

Gamble Ranch Development Corp.  
9615 Brighton Way  
Beverly Hills  
Calif.

Gentlemen;

Pursuant to information in the July-August 1962

issue of "Real Estate Bulletin" as follows "Brought

W.H. Baker

1005 No. Grand Ave.,  
Covina, Calif.



Gamble Ranch Development Corp.

rip

9615 Brighton Way

Beverly Hills

Calif.

Our account No. 1264-- D-15-9

Yours truly

*Wm H Baker*

Mr & Mrs Wm.H. Baker  
1005 No. Grand Ave.,  
Covina, Calif.

CC-W.A. Savage Commissioner  
Division of Real Estate  
State Of California  
1015 L Street  
Sacramento, Calif.

Bert Ross:

Article referred to above is attached hereto -  
*gvl*  
10-10-62



October 8th 1962

Gamble Ranch Development Corp.  
9615 Brighton Way  
Beverly Hills  
Calif.

Gentlemen;

Pursuant to information in the July-August 1962  
issue of "Real Estate Bulletin" as follows "Brought  
into court, Johnston pled guilty, was fined \$525.00  
and given a 60-day suspended sentence, concurrent  
with a judicial order to refund all purchase or  
deposit moneys upon buyer's requests. etc.

We previously requested refund after having made the trip  
to the Gamble Ranch and discovered how much it had  
been misrepresented to us.

We are again requesting refund of all our purchase  
money (\$540.00)

Our account No. 1264-- D-15-9

Yours truly

*Wm H Baker*

Mr & Mrs Wm.H.Baker  
1005 No. Grand Ave.,  
Covina, Calif.

CC-W.A.Savage Commissioner  
Division of Real Estate  
State Of California  
1015 L Street  
Sacramento, Calif.

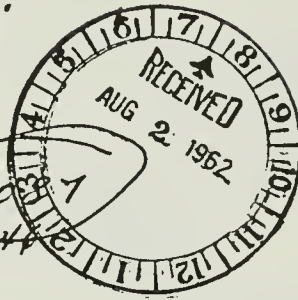
*Ross -*  
*the referred to above is attached hereto -*  
*giving*  
*10-10-62*



Aug 1, 1962

Pacific Weststates Land Develop. Corp.  
2 Wilshire Blvd.  
Beverly Hills, Calif.

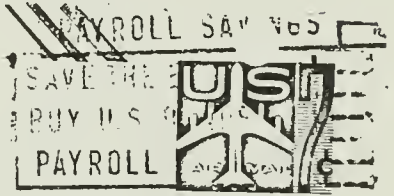
Re: Contract 10387  
Penck F-13-442



Gentlemen:

July 18, 1962 a local newspaper  
reported that California has banned  
selling anymore lots from

AFTER FIVE DAYS RETURN TO  
Mrs. Angela Hernandez  
2465 Chestnut St. Apt. 302  
San Francisco, Calif.



PAR AVION VIA AIR MAIL CORREO AEREO

Pacific Weststates Land Develop. Corp.  
2 Wilshire Blvd.  
Beverly Hills, Calif.

Please advise me of  
within 5 days, as my attorney  
standing by for the results of  
correspondence.

Respectfully,  
Mrs. Angela Hernandez

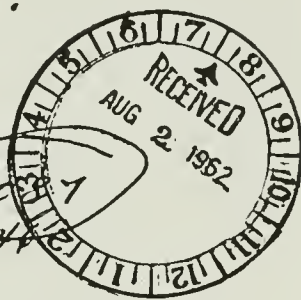




Aug 1, 1962

Pacific Weststates Land Develop. Corp.  
9412 Wilshire Blvd.  
Beverly Hills, Calif.

Re: Contract 10387  
Ranch F-13 442



Gentlemen:

On July 18, 1962 a local newspaper reported that California has banned Nevada from selling anymore lots from Gamble Ranch acreage.

Because the true conditions of water and electricity were misrepresented to us as buyers, I feel that this investment does not warrant further monies.

I urge you to sell the acreage or return to me the monies already invested.

Please advise me of your intention within 5 days, as my attorney standing by for the results of correspondence.

Respectfully,  
Mrs. Angela Alimonda



re: Contract no. 1550  
Ranch No. D15-14

Jan. 20, 1963

To whom it may concern:

Dear Sir,

This is a request for the return of \$230.00 which we have paid towards a 2 1/2 acre parcel of the Double Ranch.

We have received a statement, upon request, from the B.B.B. and found it to be a bad investment.

The property was misrepresented to us. Therefore we have a legal right to have all money refunded.

We wish to do this out of court, but will go if necessary.

Please notify us, to your decision, within ten days, so we will know what action to take.

Sincerely

Mr. & Mrs. Orphee



98 Lyndale Avenue  
Monterey, California  
September 24, 1962

Berttram H. Ross  
San Angeles, Calif.

Re: Gamble Ranch

RECEIVED  
SEP 24 1962  
BERTTRAM H. ROSS

Dear Sir:

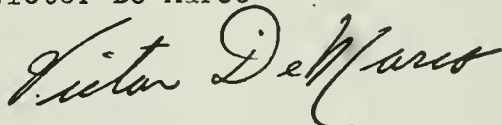
Mr. Anthony Verna has informed that he has settled his claim with Pacific Westates Land Development Corp. without retaining a private attorney as we had previously planned.

We would also like to make a similar settlement because we feel that the salesman had made misrepresentations by stating that the soil was rich, fertile soil and water could be obtained at 8 to 20 feet.

Our balance due is approximately \$2,000. Your immediate attention to this matter will be greatly appreciated.

Yours very truly,

Victor De Marco







Oct. 1. 62.

Dear Sirs:

In reply to your letter on redem side, I have no explanation as to my delinquent payments. I have listened to many things on T.V. concerning this Gamble Ranch bit, and none of it has been in your favor. All I can tell is that, we've been taken!

Where money is concerned, we can get pretty blown up, either you show us positive proof of what has been said on your side is true and I mean the whole bit or we too can be funny;

Please prove to us that it is not a fraud, for we had honest intentions in buying as we hope you had in selling.

Truly M. Donahue  
and Joe John Donahue

10/20/62 ledger card noted - glw to J. Carey



WENDELL MACKAY

ATTORNEY AT LAW  
SECURITY BUILDING  
102 NORTH BRANO BOULEVARD  
GLENDALE 3, CALIFORNIA  
CITRUS 1-2189

OCT 22 1962

October 19, 1962

1 Estate Commission  
the State of Nevada  
erson City, Nevada

Re: Cecil B. Van Sciver, 4731 Lowell Ave., } *ledger card as noted*  
La Crescenta, California, } *glw 10/20/62*  
Contract 2151, Ranch K-23-10 }  
and  
Charles Bradshaw, 7930 Wentworth, }  
Sunland, California, } *ledger cards sent glw*  
Contract G-572, Ranch E-25-7 and } *10/20/62*  
Contract G-576, Ranch B-7-13 }  
all with  
Gamble Ranch

tlemon:

Mr. Cecil Van Sciver entered into a contract with the  
representatives of the Gamble Ranch for the sum of \$4490.00  
has paid in the sum of \$1345.47.

Mr. Charles Brandshaw entered into two contracts with  
representatives of the Gamble Ranch, one for the total  
contract price of \$6,000.00, upon which he has paid in  
\$8.61; and the other for the total contract price of  
\$1000.00, upon which he has paid in \$1107.10.

Each of my clients feels that there has been a fraud  
noticed upon them in this matter, and we are informed  
that your Honorable Commission has declared that the sale  
of the Gamble Ranch, or portions of the Gamble Ranch,  
constituted misrepresentation, if not fraud, and that you  
ordered them to refund the money that each of the  
respective purchasers had paid in.

Would you please verify whether or not your Commission  
has issued such an order, and advise us how we should  
proceed to collect.

Very truly yours,

*Wendell Mackay*  
Wendell Mackay

1  
Gamble Ranch  
9412 Wilshire Blvd.  
Beverly Hills, Calif.



17700 Lahey St.  
Beverly Hills, Calif.  
Sept. 30, 1962

Gamble Ranch  
9412 Wilshire Blvd.  
Beverly Hills, Calif.

# 2963  
P.

Last December my son Donald Bishop & I  
bought 10 acres in ~~K-35-T-39N-R68E~~ sec. ~~K-35-T-39N-R68E~~ also my daughter  
Doris Miles bought 10 acres sec. ~~F-33-39-69~~ . We ~~knew~~  
we are buying undeveloped land, but we had a great  
deal of encouragement such as, by the month of May the  
land will be bladed - The land could be leased for alfalfa  
as it is now - The land has water now with-in 8  
feet of ground surface in two locations this gives indica-  
tion that drilling individual wells for each of 40 acre  
parcel in the Unit is a practical method I suppose  
development. You also promised for High Voltage lines  
for industries, you also printed in your Gazette the  
"Good News" of manufacturing & industries starting.  
You promised that the new highway is going through &  
in a few months it will be finished. Many encouraging  
ideas were written of many so called visitors, but one  
thing I can say is to see for yourself.

This summer my son Donald went on his vacation  
& went through Gamble Ranch. The land was there  
alright, but where are the stakes to the individual  
acreage that was bought by people like us. The High-  
way is far far from finished there was no blading or  
sign of it in our section at all. We were told we could  
lease the land for Alfalfa, will you please tell me where is the  
land & how can we lease such land?? If you can get





II.  
electricity why not get it? We would like to put in  
our trailer for our summer vacations so we can go fishing  
& hunting as your salespeople talked. We hardly don't know  
what to think especially since we received a notice with  
your heading below Western Pacific Land development. I just  
wonder what, how can we have any faith in this  
deal when we read a number of times in leading  
news papers where your salespeople have misled others.

Since the state of Calif. has forbidden the sale  
of any more land ~~in~~ at the Gamble Ranch. we  
are very discouraged & we are thinking of consulting  
a counselor to that respect. After all too much  
has been said & done in land development these  
days & believe me we had have all your promises  
in black & white, so I would like a full  
detail, why isn't the land ~~planted~~ as was promised  
why isn't there anything done about water, how can I  
lease the property to help us pay it up? These things  
are very important to us. I would appreciate an answer  
in the nearest future

Truly Yours  
Mrs. Emily Diskara



# 1542

Dear Sir :

Until I can find out more information concerning land that was purchased from Gamble Ranch and all the very unfavorable news that is now coming out concerning said property I will not send you any more money. In fact will do every thing I can to redeem money that has already been sent to you.

Its too bad that we have so many dishonest people in our country that will go to no ends to fraud other people out of their money.

Thanks.

Rich M. Lusser  
1019 2nd Ave.  
San Mateo, Calif.



photo made & filed -  
ledger did marker

January 5, 1963

N. J. Rockel  
Candle Ranch  
15 Brighton Way  
Sunny Hills, Calif.

Re: Contract 2445  
K-13-21

Dear Mr. Rockel,

Last year I wrote you a letter about getting a refund on land we had purchased & on January 12, 1962 you wrote & said we would have to come into the office & sign paper. We came in & talked to Mr. Stein on January 17. All he did was double talk us after we drove all that distance.

Later we received a letter from one of your lawyers saying no refund could be made as it wasn't misrepresented. Well, things have changed. We recently went to see our land & found it quite a joke compared to the brochures we have that the salesman left. We want our money back & we aren't going to make trips to your office





either as it's just something a waste time.  
unless we get some satisfaction in going  
to write to the Editor of Times newspaper  
(whose article I still have) who stated  
your company would make refunds.  
If that doesn't seem effective there are  
other ways.

Your early reply will be appreciated.

Very truly yours,  
Mrs. Stanley Olderp

Stanley G. Olderp  
753 Gondar Ave  
Long Beach 8, Calif.



August 3, 1962

Gamble Ranch Investment Company  
412 Wilshire Blvd.  
Beverly Hills, California

Dear Sirs:

I have talked to my lawyer, Real Estate people and my Minister--"you  
now I have been taken".

You know I am a working woman and do not have money to throw away.  
My lawyer's representative was here two years ago and painted

pictures and said

*Margie E. Winter*  
*7401 Wilshire Rd.*  
*Riverside, California*  
RIVERSIDE  
AUG 3  
4-PM  
CALIF.  
ed ten acres  
on of the  
been taken.  
Nevada pa-  
resentation  
ach rash

property and  
it in the

GAMBLE RANCH DEVELOPMENT CORPORATION

9412 WILSHIRE BOULEVARD

BEVERLY HILLS

CALIFORNIA

California con-

dishonest

Sincerely,

*Margie E. Winter*  
Margie E. Winter

ew/gh





August 3, 1962

ble Ranch Investment Company  
2 Wilshire Blvd.  
erly Hills, California

r Sirs:

ave talked to my lawyer, Real Estate people and my Minister--"you  
w I have been taken".

know I am a working woman and do not have money to through away.  
n your sale's representative was here two years ago and painted  
h a beautiful picture of the land and showed me pictures and said  
hin five years the land would be worth several thousand dollars an  
e--I could not pass up such an investment--so I purchased ten acres  
-6. When I received the tax slip and found out the valuation of the  
d is only fifty dollars and taxes \$1.45, then I knew I had been taken.  
ently I have read too many articles in the California and Nevada pa-  
s concerning said land. Do you know this is fraud-misrepresentation  
land, etc. and you know what happens to people that makes such rash  
tements?

ave paid in over nine hundred dollars on this piece pf property and  
ould like to have it returned to me at once or I will put it in the  
ds of my lawyer.

ave also written to the Real Estate Commissioner of California con-  
ning this matter.

m an honest woman and this hurts me deeply to find so many dishonest  
ple on the world.

xpect a reply to this letter immediately.

Sincerely,

*Margie E. Winter*  
Margie E. Winter



/gh



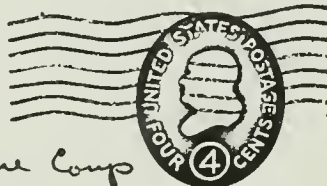


Sir:

I am writing this letter  
in regard of Contract G-931  
Ranch F-27-4. We bought  
this 10 acres on a interview  
by your Investment Counselor  
Allen. M. SKALE they tell me  
that he is no longer with  
the Company.

We have seen the  
property and we are disappointed  
in this whole matter has been  
misrepresented by your Investment  
Counselor that sold this property  
to us there is a few more  
property owners that are going  
to get together if our money  
is not returned to us that we  
have put into this land plus <sup>interest</sup> charges.  
I like to say that we are going  
to get the backing of State Real  
Estate Commissioner Wynne A. Savage  
over. 47

L. V. Vento  
1321 Highland  
Brentwood



Gamble Ranch Deed Corp  
9412 Wilshire Boulevard  
Beverly Hills  
Calif





I have a copy of this  
letter I would like too  
have from your lawyer as  
soon as possible so I  
may use this money  
in a good investment.

I like to say there is at  
least a half dozen of us  
is going to get together to  
fight if we half and I  
hope before were are through  
we half a lot more on  
our side

Yours Truly

A L Verna

13432 Giordano

La Puente

Ed 86275

P.S. that will  
be no payment  
made at this time  
until I hear from  
you.



A L Verna  
13432 Giordano  
La Puente.



Gamble Ranch Dene Corp  
9412 Wilshire Boulevard  
Beverly Hills  
Calif





2288 K  
ledger card marked  
BG  
OCT 19 1962

October 18, 1962

able Ranch  
2 Wilshire Blvd.  
erly Hills, California

Clemen:

Since receiving your letter, in answer to my request  
a return of our money I am puzzled. Just what goes--?  
ave the clipping which says quote " If there are people  
feel they were not treated fairly, please advise them  
contact this office, and the money, regardless of the  
nt that they have paid---will be refunded in full  
diately." McDonald told the commission "we would be  
led pink to give anybody who was not satisfied his money  
."

You and I both know there was misrepresentation as to  
r--(there is no question on that--you lost a case  
ntly and that was one of the reasons). Shall I go on?

This is our last request for a refund, before seeking  
l advice.

erely yours,

ille T. Killalea  
ille T. Killalea





**APPENDIX D.**

**Exhibit 1-1125: Consent Agreement.**



Case No. 33496-(EC) Crim.

U.S.A. vs Benaron, etal

Gov't Exhibit 2-1291

Date 2-6-71 No. 2-1291 Identification

Date No. In Evidence

Clerk, U.S. District Court, Sou. Dist. of Calif.

Wayne E. Payne

Deputy Clerk

Wayne E. Payne



BEFORE THE REAL ESTATE COMMISSIONER  
OF THE STATE OF CALIFORNIA

IN THE MATTER OF THE SALE OF  
SUBDIVIDED LANDS IN THE AREA  
KNOWN AS "GAMBLE RANCH" BY  
PACIFIC WESTATES LAND  
DEVELOPMENT CORPORATION,  
GRACE & McCANN, INC., GAMBLE RANCH  
DEVELOPMENT CORPORATION, et al.

No. H-15321 LA  
ORDER TO DESIST AND REFRAIN;  
STOP ORDER; and  
CONSENT AGREEMENT

The Real Estate Commissioner of the State of California,  
having conducted an investigation into the above-entitled  
matter, has found and concluded from evidence satisfactory to  
him that:

I

The "Company" referred to herein is PACIFIC WESTATES  
LAND DEVELOPMENT CORPORATION which was incorporated under the  
laws of the State of Nevada on August 14, 1959 under the name  
"GAMBLE RANCH INVESTMENTS." The Company subsequently changed  
its name to WESTATES LAND DEVELOPMENT CORPORATION and thereafter  
to PACIFIC WESTATES LAND DEVELOPMENT CORPORATION. The Company  
was formed for the purpose of acquiring, and did acquire shortly  
after its formation, the title to approximately 236,000 acres  
of land situated principally in Elko County, Nevada, and commonly  
known as and referred to herein as the "GAMBLE RANCH."

II

GRACE & McCANN, INC., is a corporation organized under  
the laws of the State of California. GAMBLE RANCH DEVELOPMENT





CORPORATION is a corporation organized under the laws of the State of Nevada. Such corporations are owned, controlled and operated by the Company and/or by managing and controlling persons of the Company, as sales organizations, and are integral parts of the Company's operations.

### III

Since approximately December, 1960, the Company has been owned and controlled by J. J. Byrnes, Joseph Benaron and Samuel Reisman.

The present members of the Board of Directors of the Company now are John W. Carey, Helen Rubin, and R. N. Nickels.

The managing officers and employees of the Company until approximately April 15, 1962, included J. J. Brynes, President; John William Carey, Vice President; Helen Rubin, Secretary; and William Stein, Sales Manager.

### IV

Various parcels of the Company's properties on the Gamble Ranch have been subdivided and are the subject of Final Subdivision Public Reports issued by the Division of Real Estate of the State of California at various times between December 7, 1960 and April 3, 1962, which subdivisions are identified in the records of the Division of Real Estate as: RES LA 19472, RES LA 19473, RES LA 19474, RES LA 19475, RES LA 19768, RES LA 17803 and RES LA 21608.

### V

Subdivided parcels or lots of the said real property



owned by the Company, and known as the GAMBLE RANCH, having been widely sold and offered for sale to the members of the public residing in California, and the Company, with the knowledge and authority of its officers, directors and controlling persons, and acting by and through its duly authorized agents and employees, has published, distributed, issued and circularized by advertisements, brochures, letters, recordings, documents, pictures and other written and oral statements various representations and statements concerning such lots and parcels offered for sale, pertaining to the nature, condition, physical attributes, economic utility, status and desirability of such lots and parcels in California and to persons residing in California; and residents of the State of California have purchased or have entered into contracts to purchase parcels or lots of such subdivided lands owned by the Company in reliance upon one or more of such representations or statements.

## VI

The Company and each and all of the other persons, both natural and legal, named below, and for their respective heirs, assigns and successors in interest, agree, consent, waive and represent to and with the Commissioner and the People of the State of California as follows:

(1) They, and each of them, consent to the making of the Order hereinafter set forth and to each of its parts and terms, admit the truth of the recitals herein, and waive any and all defenses or objections whether known or unknown which they, or any of them, may now have or may at any time in the future have, to the form, substance, issuance and enforcement of said Order against them, or any of them; and

(2) They, and each of them, represent and agree that each and all of the legally required facts, and circumstances,



for the issuance of said order by the Commissioner exist, and more particularly that each and all of the facts, conditions and circumstances legally required for the exercise by the Commissioner of the powers conferred upon him by Section 10086 of the Business and Professions Code and for the making of the Order hereinafter set forth pursuant to such section exist; and, further, that each and all of the facts, conditions and circumstances legally required for the exercise by the Commissioner of the powers conferred upon him by Section 11019 of the Business and Professions Code and for the making of the Order hereinafter set forth pursuant to such section exist; and

(3) That each and all of them waive any and all rights which they, or any of them, have to a hearing by the Commissioner pursuant to and as provided for by Section 11019 as a condition to the making of the Order hereinafter set forth pursuant to said section, either prior to the making of such order or thereafter, and they, and each of them, agree that such Order shall have full force and effect as if a hearing as provided by such section had been held; and

(4) They, and each of them, waive any and all rights which they, or any of them, have to a hearing pursuant to Section 10086 of the Business and Professions Code, or any part thereof, and waive any and all rights which they, or any of them, have to make demands or requests as provided in such section, and to any provisions that the Commissioner initiate any proceedings for injunction, or otherwise, in the Superior Court of the State of California, and they, and each of them, agree that the Order hereinafter made shall have full force and effect under Section 10086; and

(5) They, and each of them, waive any and all rights which they, or any of them, have to judicial review of the Order





hereinafter made, either directly by mandate proceedings or otherwise or collaterally or by calling the validity of the same into question in any action, suit or proceeding, judicial or administrative; and

(6) They, and each of them, agree for the benefit of the People of the State of California, that they, and each of them, will abide by, obey and perform the terms of the Order hereinafter made, that such Order shall constitute a promise by them, and each of them, to the People of the State of California, for the breach of which the People of the State of California shall be deemed to be irreparably damaged, and for which legal relief shall be deemed to be inadequate, and they, and each of them, agree that the Commissioner and the People of the State of California, or either of them, may enforce or secure the enforcement of such Order or promise by temporary restraining order, preliminary and final injunctions in suits in the Superior Court;

(7) They, and each of them, agree and admit that this Order, including the recitals and the Order and each and every part of the same, are severable and that if any part, paragraph or phrase hereof shall be held to be invalid, either on its face or as applied to any person, then the validity and effect thereof as applied to any other person shall remain unaffected and the validity and effect of any portion or part thereof not found invalid shall remain in full force and effect.

## VII

In the making of the Order hereinafter set forth, the Commissioner has relied and does not rely upon each and all of the foregoing agreements, waivers, consents and representations made by such persons, named or referred to herein, and each of them.



NOW, THEREFORE, YOU:

PACIFIC WESTATES LAND DEVELOPMENT CORPORATION,  
also known as WESTATES LAND DEVELOPMENT  
CORPORATION, ALSO KNOWN AS GAMBLE RANCH  
INVESTMENTS; and  
GRACE & McCANN, INC.; and  
GAMBLE RANCH DEVELOPMENT CORPORATION; and  
J. J. BYRNES;  
JOSEPH BENARON;  
SAMUEL REISMAN;  
JOHN W. CAREY,  
WILLIAM STEIN;  
HELEN RUBIN;  
R. N. NICKELS.

AND EACH OF YOU, AND YOUR AGENTS, EMPLOYEES, HEIRS, ASSIGNS AND  
SUCCESSORS IN INTEREST, ARE HEREBY ORDERED to stop, cease,  
desist and refrain from selling or offering for sale, directly  
or indirectly, to any person within the State of California or  
to any person known to be a resident of the State of California,  
any lots or parcels of land in the area known as the GAMBLE  
RANCH, including but not limited to those lots and parcels as  
to which Final Subdivision Reports have been issued; and you,  
and each of you, and your agents, employees, heirs, assigns and  
successors in interest are further ordered to stop, cease,  
desist and refrain, directly or indirectly, from issuing,  
distributing, publishing or circulating within the State of  
California, or to persons known to be residents of the State  
of California, brochures, pamphlets, documents, letters, written  
or oral statements, recordings or advertisements of any kind  
whatsoever, whether by newspaper, radio or television or other-



wise, concerning such lands. This order effective July 16, 1962

DATED: July 13th 1962

W. A. Savage  
Real Estate Commissioner

W. A. Savage





BEFORE THE REAL ESTATE COMMISSIONER  
OF THE STATE OF CALIFORNIA

IN THE MATTER OF THE SALE OF  
SUBDIVIDED LANDS IN THE AREA  
KNOWN AS "GAMBLE RANCH" BY  
PACIFIC WESTATES LAND  
DEVELOPMENT CORPORATION,  
GRACE & McCANN, INC., GAMBLE RANCH  
DEVELOPMENT CORPORATION, et al.

NO. H-15321 LA

CONSENT AGREEMENT

WE, AND EACH OF US, the undersigned, for ourselves and for our respective heirs, assigns and successors in interest, whether by voluntary act or by operation of law, agree, consent, waive, and represent to and with the Real Estate Commissioner of the State of California and the People of the State of California, as follows:

(1) We, and each of us, have read and understand the foregoing Proposed Order, including the recitals therein, entitled, "In the Matter of the Sale of Subdivided Lands in the Area Known as 'Gamble Ranch' by Pacific Westates Land Development Corporation, et al.", No. H-15321 LA, Before the Real Estate Commissioner of the State of California; and we, and each of us voluntarily and freely agree, consent, waive and represent as herein set forth; and,

(2) We, and each of us, consent to the making of said Order and to each and every recital and provision therein, admit the truth of the recitals therein, and waive any and all defenses or objections, whether now known or unknown, which we, or any of us, may now have or may at any time in the future



have to the form, substance, issuance and enforcement of said Order against us, or any of us; and,

(3) We, and each of us, represent and agree that each and all of the legally required facts, conditions and circumstances, for issuance of said Order by the Commissioner exist, and more particularly that each and all of the facts, conditions and circumstances legally required for the exercise by the Commissioner of the powers conferred upon him by Section 10086 of the Business and Professions Code and for the making of said Order pursuant to said section exist; and, further, that each and all of the facts, conditions and circumstances legally required for the exercise by the Commissioner of the power conferred upon him by Section 11019 of the Business and Professions Code, and for the making of said Order pursuant to said section exist; and,

(4) We, and each of us, waive any and all rights which we, or any of us, have to a hearing by the Commissioner pursuant to and as provided for by Section 11019 as a condition to the making of said Order, either prior to the making of such order or thereafter, and we, and each of us, agree that said Order shall have full force and effect as if a hearing provided by such section had been held; and,

(5) We, and each of us, waive any and all rights which we, or any of us, have to a hearing pursuant to Section 10086 of the Business and Professions Code, or any part thereof, and waive any and all rights which we, or any of us, have to make demands or requests as provided in such section, and to any provisions that the Commissioner initiate any proceedings for injunction, or otherwise, in the Superior Court of the State of California, and we, and each of us, agree that said Order shall have full force and effect under Section 10086; and,



(6) We, and each of us, waive any and all rights which we, or any of us, have to judicial review of said Order either directly by mandate proceedings, or otherwise, or collaterally, or by calling the validity of the same into question in any action, suit or proceeding, judicial or administrative; and,

(7) We, and each of us, agree for the benefit of the People of the State of California, that we, and each of us, will abide by, obey and perform the terms of said Order; that such Order shall constitute a promise by us, and each of us, to the People of the State of California, for the breach of which the People of the State of California shall be deemed to be irreparably damaged, and for which legal relief shall be deemed to be inadequate, and we, and each of us, agree that the Commissioner and the People of the State of California, or either of them, may enforce or secure the enforcement of said Order or promise by temporary restraining order, preliminary and final injunctions in suits in the Superior Court; and,

(8) We, and each of us, agree and admit that said Order, including the recitals therein and each and every part of same, are severable and that if any part, paragraph or phrase thereof shall be held invalid, either on its face or as applied to any person, then the validity and effect thereof as applied to any other person shall remain unaffected, and the validity and effect of any portion or part thereof not found invalid shall remain in full force and effect.

DATED July 16, 1962.

PACIFIC WESTATES LAND DEVELOPMENT COMPANY

BY /s/ J. J. Byrnes

(SEAL)

\_\_\_\_\_  
President

BY /s/ Helen Rubin

\_\_\_\_\_  
Secretary





GRACE & McCANN, INC.

(SEAL)

BY /s/ John W. Carey President

BY /s/ Helen Rubin Secretary

GAMBLE RANCH DEVELOPMENT CORPORATION

(SEAL)

BY /s/ John W. Carey President

BY /s/ Helen Rubin Secretary

/s/ Samuel Reisman  
By Bertram H. Ross, his attorney-in-fact  
Samuel Reisman, Individually and as  
a major shareholder of Company

/s/ J. J. Byrnes  
J. J. Byrnes, Individually and as  
President of Company and as major  
shareholder of Company

/s/ John W. Carey  
John W. Carey, Individually and as  
Director and as Vice-President of  
Company

/s/ Helen Rubin  
Helen Rubin, Individually and as  
Director and as Secretary of Company

/s/ R. N. Nickels  
R. N. Nickels, Individually and as  
Director of Company

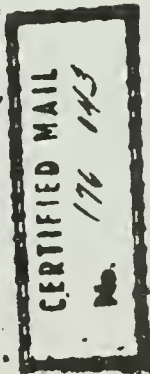
/s/ Robert L. Stein  
Robert  
William Stein, Individually and as  
Sales Manager of Company

/s/ Joseph Benaron  
Joseph Benaron, Individually and as  
principal shareholder of Company



John W. Carey  
c/o Pacific Westates Land Development Corp'n.  
9412 Wilshire Blvd.  
Beverly Hills, California

RETURN RECEIPT REQUESTED





**APPENDIX E.**

**Exhibit BV: Letter From Department of Justice  
to Land Purchaser.**

**Exhibit 2-1291: Government Questionnaire Sent to  
Land Purchaser.**





United States Department of Justice

UNITED STATES ATTORNEY

SOUTHERN DISTRICT OF CALIFORNIA

600 FEDERAL BUILDING

LOS ANGELES, CALIFORNIA 90012

November 14, 1963

Dear Citizen:

There is now in progress an official investigation by the United States Department of Justice and the United States Post Office Department, concerning the use of the mails in connection with the promotion and sale of land on Gamble Ranch, Nevada. Your cooperation in answering the enclosed questionnaire will be of material aid.

Please answer the questions as fully, and in as much detail, as possible. It is realized that the matters about which this inquiry is made may have occurred some time ago and your memory may now be less than complete; therefore, your answers should be your best recollection at this time.

Since this is an investigation, it is requested that you treat this communication as confidential. Please complete the questionnaire, and return it, as soon as possible, in the enclosed envelope which requires no postage. Your cooperation is greatly appreciated.

Sincerely yours,

*Francis C. Whelan*  
FRANCIS C. WHELAN

Enclosure

Case No. 33496-(EC) Crim.  
U.S.A. vs Benaron, et al  
Deft Exhibit BV  
Date 5-13-68 No. BV Identification  
Date 5-13-68 No. BV In Evidence  
Clerk, U.S. District Court, Sou. Dist. of Calif.  
Wayne E. Payne Deputy Clerk  
Wayne E. Payne



Case No. 33496-(EC) Crim.

U.S.A. vs Benaron, etal

Gov't Exhibit 1-1125

Dates 5-12-65 No. 1-1125 Identification

Dates 5-12-65 No. 1-1125 In Evidence

Clerk, U.S. District Court, Sou. Dist. of Calif.



Deputy Clerk

Wayne E. Payne



## Q U E S T I O N N A I R E

How did you first learn that Gamble Ranch land was for sale?

An advertisement in the T.V. Guide in the Times (Los Angeles) Paper

A. What contacts did you have with Gamble Ranch representatives prior to purchasing land on the ranch?

None

B. Did you purchase, or agree to purchase, any Gamble Ranch land? Yes If so, please answer the following:

1. When? May 11, 1961

2. Where was the contract signed? At our home.

3. How many acres did you purchase? 10

4. Price? \$2490.00

5. Legal description and Parcel Number:

South East one-quarter of South East one-quarter of the  
south-west one-quarter of Section 35, T. 39 N., R. 68 E.  
M.D.M.

6. Salesman's name? R. Gordon Heinzelman

7. Broker's name? Gamble Ranch Development Corporation

If a sales presentation was made to you, please answer the following questions:

A. What materials were shown to you by the salesman?

YES NO

1. Colored movies. — —

2. Colored film-strip and sound recording. x —

3. Colored brochure. x —

4. White-blue-black brochure. x —





	<u>YES</u>	<u>NO</u>
5. Colored photographs in looseleaf binder	_____	<u>x</u>
6. Miscellaneous letters (from Governor of Nevada, Nevada Ranch Service, A-D Machinery Co., etc.)	_____	<u>x</u>
7. Sheet depicting Victor Gruen "master plan" for development of the ranch.	_____	<u>x</u>
8. Other (specify) _____		

What, if anything, did the salesman tell you regarding each of the following subjects?

1. Water:

a. The availability of water (abundant or scarce, etc.)?

Abundant

b. Sources from which water was available (wells, water company, etc.)?

Wells

c. The distance from ground surface to water?

10 to 35 feet or more

d. The depth to which a well would have to be sunk in order to produce water sufficient for --

(1) house and garden use? 10 - 50 feet

(2) irrigation? \_\_\_\_\_

e. The depth of existing wells on the ranch?

\_\_\_\_\_

f. The cost of drilling a well for --

(1) house and garden use? \_\_\_\_\_

(2) irrigation? \_\_\_\_\_



g. The cost of equipping a well with pump and motor for --

(1) house and garden use? Not discussed.

(2) irrigation? "

h. The existence of State laws or regulations restricting the depth of drilling for, or pumping of, underground water?

Not discussed

i. Other representations about water?

None

2. Agricultural Potential:

a. The quality, nature, and fertility of the soil?

Could be very fertile.

b. The weather and climate (especially summer and winter)?

As would be expected of the locale.

c. Length of growing season (the period between killing frosts)?

not discussed

d. Existence of hazards to crops (frost, floods, wind, hail, dust storms, etc.)?

Not discussed

e. Crops that could be grown on your property?

not discussed

f. Yields that could be expected on the crops mentioned above?



- g. The possibility of farming the land for a living, or at least for some profit?

Not discussed.

- h. The cost of clearing the land and preparing the soil for crops?

Not discussed.

- i. Other representation concerning agriculture?

None

3. Electricity:

- a. The availability of electricity for

(1) household use? not discussed

(2) agricultural and industrial use?

- b. The cost of bringing electric lines to your property?

not discussed.

- c. Other representations concerning electricity?

None

4. Actual and Proposed Developments:

- a. Construction and maintenance of roads?

A new highway leading to the Ranch from Wells.

- b. Surveying of parcels, and staking of property so that it could be located?

Was in the offing.

- c. The planned shopping center?

Not discussed.





- d. Establishment of industries and businesses on the ranch?

Ashirt factory had opened, and a barber shop and beauty shop were almost ready to open.

- e. Government ownership of alternate sections of the ranch?

Was never mentioned.

- f. The financial ability of Gamble Ranch to carry out its proposed developments?

Seemed to have potential.

- g. Other representations concerning development of the ranch?

None

5. The Town of Montello:

- a. The size of the town and whether its population was increasing or declining?

Not much was said about the actual town.

- b. What schools are located there?

Elementary School.

- c. What stores, shops, and services are available there?

Several stores, and also two landing strips for planes.

Availability to the railroad was discussed.



d. Job opportunities and labor supply available there?

Not discussed.

e. Other representations concerning Montello?

None

C. To the best of your recollection, did the salesman furnish you a copy of the Subdivision Public Report issued by the California Division of Real Estate? Yes

**Yes**

1. When (before or after you signed the contract)?

Before

2. Describe in detail the manner in which the report was given to you:

Salesman handed the document to us and told us to read it. We

did.

3. What did the salesman say about the report?

Do not recall.

4. Do you remember signing a copy of the report and returning it to the salesman?

~~No~~ Yes

For what purpose did you purchase the land?

### A. Living on the land

### B. Farming the land yourself

### C. Sharecropping

### D. Investment/Resale

E. Other (specify)

F. In the event you planned to use the land yourself, please state the approximate time when you intended to begin such use:



Have you ever visited the ranch property? Yes

A. On how many occasions? Once

B. On what approximate date or dates? August, 1961

C. Which of the following did you see?

	<u>YES</u>	<u>NO</u>
1. The land you purchased	<u>      </u>	<u>x</u>
2. The town of Montello	<u>x</u>	<u>      </u>
3. The motel	<u>x</u>	<u>      </u>
4. The main ranch house	<u>x</u>	<u>      </u>
5. Crittenden Reservoir	<u>      </u>	<u>x</u>
6. Wells, springs, streams	<u>      </u>	<u>x</u>
7. Roads	<u>x</u>	<u>      </u>
8. Other features (specify) _____		

D. Was the appearance of any of the above items (that you saw) what you thought it would be? Yes  
If yes, which items?

All of it was what we had expected it to be.

If not, in what respect did the items differ from what you expected?

E. Were you escorted around the ranch by a Gamble Ranch representative? No. If so, who? \_\_\_\_\_  
What, if anything, did he say about the property?

F. Did you, or anyone that you know of, take photographs of the ranch property? Yes. If so, who (name and address)?

Mr. & Mrs. Walter A. Garrick - 3027 Delaware Ave., Santa Monica





In regard to your land sale contract:

- A. What was the amount of your initial deposit? \$125.00
- B. The amount of your monthly payments? \$35.00
- C. Total purchase price? \$2490.00
- D. Present status of your contract?

(Check appropriate Box)

1. Paid up ☐ Deed received ☐
2. Still paying on contract ☒
- a. What is balance due? \$1591.13 Amount paid in? \$898.87
- b. To whom are payments being made? Nevada Title Guaranty  
Co., P.O. Box 1468, Reno, Nevada
3. Payments discontinued ☐
- a. When? \_\_\_\_\_
- b. Amount paid prior to that time? \_\_\_\_\_
- c. Why were payments discontinued? \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_
- d. Were you ever contacted by Gamble Ranch about continuing or resuming your payments? \_\_\_\_\_  
If so, what were you told and by whom? \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

E. Have you made any complaint, or request for a refund or cancellation? No

1. How many? \_\_\_\_\_
2. To whom? \_\_\_\_\_
3. Result? \_\_\_\_\_  
\_\_\_\_\_



4. What were you told about the availability of refunds, and by whom were you told it?

There was an article in the Times regarding refunds to those  
who were dissatisfied in any way, but we did nothing since we  
were satisfied with our deal.

5. Why did you make your complaint or request?

- F. Have you ever asked Gamble Ranch about publicity arising from proceedings against the company by the Nevada or California Real Estate Commissions? No

1. What were you told?

2. By whom?

- G. What papers, if any, do you possess which relate to your dealings with Gamble Ranch?

Original Contract - Payment booklet, letters from the Ranch from time  
to time, giving information regarding progress.

Have you made any effort to ascertain whether or not the land you purchased was fairly represented by the salesman and sales material? Yes - we went there. If so, what effort?

- A. Do you feel that the land was: (Check appropriate box)

1. Accurately represented

☒

2. Misrepresented

☐

3. Other (specify)



-11-

Continue comments here):

Your Name(s): Walter A. Garrick

Address (home): 3027 Delaware Ave., Santa Monica, Calif. Phone: Ex. 3-4

Business Address: St. John's Hospital - Santa Monica, Calif. Phone: Ex. 3-95  
Ex. 3-35

Date: November 20, 1963

